Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

THERESA D'JAMOOS, *ET AL.*,

Petitioners,

v.

PILATUS AIRCRAFT, LTD.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does purposeful availment of the market of the United States as a whole, which creates general jurisdiction over federal claims, also create specific jurisdiction in a state in which harm occurs as a result of purposeful availment of the national market?

PARTIES TO THE PROCEEDINGS

Petitioners are Theresa D'Jamoos, as Executrix of the Estate of Dawn Elizabeth Weingeroff; Frederick L. Weingeroff, Administrator of the Estate of Leland C. Weingeroff and Executor of the Estate of Gregg C. Weingeroff; Stanley J. Wachtenheim, Executor of the Estate of Jeffrey M. Jacober; Michael A. Jacober and David S. Jacober, Co-Executors of the Estate of Karen L. Jacober and Co-Administrators of the Estate of Eric B. Jacober.

Respondent is Pilatus Aircraft, Ltd. Pilatus is a single entity which petitioners sued in the District Court under both its English and German names (Pilatus Aircraft, Ltd. and Pilatus Flugzeugweke Aktiengesellschaft). The other defendants in the case were not parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED .. 1

INTRODUCTION 2

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE PETITION ... 7

I. This Court Should Resolve a Significant Circuit Split Regarding Whether National Contacts Suffice To Support a State's Exercise of Specific Jurisdiciton 7

II. This Court Should Resolve the Lingering Split Within the *Asahi* Decision and Answer the Important Question of Federal Law 21

CONCLUSION 24

APPENDIX

APPENDIX A: Opinion of the United States District Court for the Eastern District of Pennsylvania (April 30, 2008) 1a

APPENDIX B: Opinion of the United States Court of Appeals for the Third Circuit (May 14, 2009) 29a

APPENDIX C: Amended Opinion of the United States Court of Appeals for the Third Circuit (June 24, 2009) 64a

APPENDIX D: Order of United States District Court for the Eastern District of Pennsylvania on Remand from the United States Court of Appeals for the Third Circuit (October 1, 2009) 68a

APPENDIX E: Memorandum Opinion of United States District Court for the Eastern District of Pennsylvania on Remand from the United States Court of Appeals for the Third Circuit (October 1, 2009) 70a

APPENDIX F: Order Denying D'Jamoos' Petition for Rehearing En Banc (June 24, 2009) 78a

APPENDIX G: Order Denying Pilatus' Petition for Rehearing En Banc (June 24, 2009) 81a

APPENDIX H: PA. CONST. art 1, § 11 ..... 84a

TABLE OF AUTHORITIES

Cases

A. Uberti & C. v. Leonardo, 892 P.2d 1354 (Ariz. 1995) 15, 16, 21

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) ..... *passim*

Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994). *passim*

Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984) 11

Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558 (Fed. Cir. 1994)..... 21

Boit v. Gar-Tec Products, Inc., 967 F.2d 671 (1st Cir. 1992) 10, 11

Brown v. Meter, 681 S.E.2d 382 (N.C. App. 2009)..... 21

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 8

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 9

Chandler v. Barclays Bank PLC, 898 F.2d 1148 (6th Cir. 1990)..... 9

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) 5

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991) 5

Clune v. Alimak, 233 F.3d 538 (8th Cir. 2000) 21

D'Jamoos v. Pilatus Aircraft, 566 F.3d 94 (3d Cir. 2009) 5

Dehmlow v. Austin Fireworks, 963 F.2d 941 (7th Cir. 1992) 11, 21

Dusenbery v. United States, 534 U.S. 161 (2002) 9

Ex parte Alloy Wheels International, Ltd., 882 So.2d 819 (Ala. 2003) 22

Ex parte DBI, Inc., --- So.3d ----, 2009 WL 1164959 (Ala. May 1, 2009) 19, 20, 21, 22

Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369 (8th Cir. 1990) 11

Hill v. Showa Denko, K.K., 425 S.E.2d 609 (W. Va. 1992) 18

IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254 (3d Cir. 1998) 13

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) .... *passim*

Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383 (5th Cir. 1989) 11

Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565 (Minn. 2004) 23

Kernan v. Kurz-Hastings, Inc., 175 F.3d 236 (2d Cir. 1999) 19, 21

Lawrence v. Texas, 539 U.S. 558 (2003) 9

Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939 (4th Cir. 1994) ..... *passim*

Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465 (5th Cir. 2006) 3, 16, 17

Malinski v. New York, 324 U.S. 401 (1945) 9

Max Daetwyler Corp. v. Meyer, 762 F.2d 290 (3d Cir. 1985) 13

McGee v. International Life Insurance Co., 355 U.S. 220 (1957) 24

Medical Mutual of Ohio v. deSoto, 245 F.3d 561 (6th Cir. 2001) 8, 13

Nelson v. Park Industries, Inc., 717 F.2d 1120 (7th Cir. 1983) 11

Pennsylvania v. Anderson, 385 A.2d 365 (Pa. Super. 1978) 23

Pinker v. Roche Holdings Ltd., 292 F.3d 361 (3d Cir. 2002) 13

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 8

Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415 (5th Cir. 1993) 17

Tobin v. Astra Pharmaceutical Products, Inc., 993 F.2d 528 (6th Cir. 1993) 9, 18

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993) 8, 21

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 2

Statutes

16 P.S. § 1245 23

28 U.S.C. § 1254(1) 1

35 P.S. § 6022.102 23

35 Pa. C.S.A. § 7103 23

Other Authorities

Bureau of Economic Analysis, National Income and Products Accounts Tables, Table 4.2.5: Exports and Imports of Goods and Services by Type of Product (Oct. 2009) 2

United States Department of Commerce, Bureau of Economic Analysis, Current Dollar and "Real" Gross Domestic Product (Sept. 2009) 3

United States Department of Commerce, Bureau of Economic Analysis, U.S. International Transactions Accounts Data, Table 1: U.S. International Transactions (Oct. 2009) 2

Rules

Amendments to Federal Rules of Civil Procedure, 134 F.R.D. 525 (1991) 8

Fed. R. Civ. P. 4(k)(2) 8

Constitutional Provisions

PA. CONST. art. I, § 11 23

PETITION FOR A WRIT OF CERTIORARI

Petitioners Theresa D'Jamoos, *et. al*, respectfully Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of United States District Court for the Eastern District of Pennsylvania is not reported but is available at 2008 WL 1902193 (E.D. Pa. 2008), and is reproduced in the Appendix to this Petition ("App.") at 1a-28a. The opinion of the United States Court of Appeals for the Third Circuit (App. 29a–63a) is reported at 566 F.3d 94 (3d Cir. 2009). The opinion of the United States District Court for the Eastern District of Pennsylvania on remand from the Third Circuit (App. 68a–77a) is not reported.

JURISDICTION

The judgment of the Third Circuit was issued on May 14, 2009. The Third Circuit amended its opinion (App. 64a–67a) on June 24, 2009. Timely Petitions for Rehearing en Banc were denied on June 24, 2009 (App. 78a–83a). On July 31, 2009, The Honorable Justice Alito extended the time for filing this Petition until and including October 22, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

(See Appendix 84a)

INTRODUCTION

The Circuits have split over whether purposeful availment of the United States market as a whole ("national contacts") supports the exercise of personal jurisdiction by the state in which harm occurred. The high volume of cases affected by this split[1] powerfully suggests that this Court resolve the issue.

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[1] The volume of cases involving international defendants is high. A Westlaw search yielded over 4,000 cases with party names including "S.A.," "Gessellschaft," "MBH," common terms indicating a foreign business entity. In 1987, when this Court issued its last major pronouncement on "stream of commerce," *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the United States imported about a half trillion dollars worth of goods and services annually; in 2008, the number had quintupled, to about 2.5 trillion dollars. United States Department of Commerce, Bureau of Economic Analysis, U.S. International Transactions Accounts Data, Table 1: U.S. International Transactions (Oct. 2009), Line 19, *available at* http://www.bea.gov/scb/pdf/2009/10%20October/1009_itaq_tables.pdf. In the particular area involved here—import of civilian aircraft, engines, and parts—imports also have increased in roughly the same proportion, from 6.6 to 35.4 billion dollars per year. Bureau of Economic Analysis, National Income and Products Accounts Tables, Table 4.2.5: Exports and Imports of Goods and Services by Type of Product (Oct. 2009), D-37, Line 32, *available at* http://www.bea.gov/national/pdf/dpga.pdf. Interstate commerce, as well as international commerce, has vastly expanded since *Asahi* was decided, generating cases involving intra-national defendants involved in national marketing and distribution. Between the decade after *Asahi* was decided (1988-1997) and the subsequent decade (1998-2007), the number of cases citing *Asahi* and/or *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), increased by about 50 percent, from 2343 to 3447. Annual Real Gross Domestic Product more than tripled in the twenty years after *Ashai*, from $4.7 trillion in 1987 to $14.4 trillion in 2008. United States Department of Commerce, Bureau of Economic

Four Circuits, including the Third Circuit here, reject national contacts as a basis for a state's exercise of *specific* jurisdiction when the state is the place of harm, despite the fact that those contacts justify *general* jurisdiction nationally. Four Circuits and three State courts of last resort have found that national contacts justify specific state jurisdiction.

The spilt is starkly illustrated by the contrasting resolutions, on similar fact patterns, of this case and *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir.), *cert. denied* 513 U.S. 948 (1994). The Fourth and Fifth Circuits have noted a Circuit split and urged resolution.[2] Resolution would provide plaintiffs with needed guidance regarding jurisdictional facts that must be pleaded and proved and would ensure fairness to defendants by providing fair warning about where and under what circumstances they can expect to be held to account in any given forum.

Part of the confusion in the lower courts stems from this Court's last major pronouncement on "stream of commerce" doctrine, *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), which yielded a fractured decision that disposed of the issue at hand but did not answer a key question the Court posed: "whether the mere awareness on the part of a foreign defendant that the components it

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Analysis, Current Dollar and "Real" Gross Domestic Product, column b (Sept. 2009), *available at* http://www.bea.gov/national/xls/gdplev.xls.

[2] *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 474-76 (5th Cir. 2006) (DeMoss, J., concurring); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944, 946, n.1 (4th Cir. 1994) (Niemeyer, J.), *cert. denied* 513 U.S. 1151 (1995).

manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State." *Asahi*, 480 U.S. at 105. Instead, two opinions on behalf of four Justices each, one by Justice Brennan, answering yes, and one by Justice O'Connor, requiring something more than "mere awareness," have left the lower courts to choose between them in deciding the issue.

Part of the confusion stems from the tension between *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). *World-Wide Volkswagen* at least suggests that the Fourteenth Amendment places territorial limits on the power of the states to exercise adjudicatory jurisdiction. *Insurance Corp. of Ireland* at least suggests that the due process clause does not place territorial limits on jurisdiction. Territoriality is a key notion underlying a split in the circuits regarding how to handle national contacts.

In the case at bar, six people were killed in Pennsylvania when a PC-12 airplane manufactured by Respondent Pilatus crashed there. Pilatus manufactured the plane in Switzerland, but designed the plane to Federal Aviation Administration (FAA) requirements so that it could be sold in the United States. Two-thirds of PC-12s are sold in the United States and those sales generate about half of

Pilatus's worldwide profits. The jurisdictional consequences of those facts need clarification.[3]

This Court should grant certiorari to resolve conflicts regarding the permissible scope of state exercises of specific jurisdiction over foreign defendants who exploit the market of the United States as a whole.

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[3] Under the ruling of the District Court, no jurisdiction exists anywhere in the United States; under the ruling of the Third Circuit, jurisdiction might exist in Colorado. The Third Circuit vacated the District Court's determination to the extent that it denied Petitioners' motion to transfer venue to the U.S. District Court for the District of Colorado, and remanded the action to the District Court for further proceedings. *D'Jamoos v. Pilatus Aircraft*, 566 F.3d 94, 97 (3d Cir. 2009). The Court of Appeals held that the Petitioners made a prima facie showing of general personal jurisdiction over Respondent in Colorado, and left it up to the District Court to determine whether transfer to Colorado would be "in the interest of justice." *See id.* at 111. On October 1, 2009, the District Court for the Eastern District of Pennsylvania severed Petitioners' claims against Pilatus and ordered them to be transferred to the District of Colorado. (App. 68a–77a) While the Third Circuit's determination that there is general jurisdiction over Pilatus in Colorado is law of the case that counsels against reconsideration of personal jurisdiction by the transferee court, there are several circumstances under which the District Court of Colorado may reconsider the issue of personal jurisdiction. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816-17 (1988); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991). *See also D'Jamoos*, 566 F.3d at 111. Thus, Petitioners may face this personal jurisdiction hurdle again in Colorado. Finally, while there is *general* jurisdiction over Pilatus in Colorado, that state has little to no connection to the facts of this particular case, and Petitioners maintain that *specific* jurisdiction in Pennsylvania is proper.

STATEMENT OF THE CASE

The claims at issue arise from a plane crash in Pennsylvania that killed all six people aboard the aircraft. Petitioners, the representatives of the deceased, allege that the crash occurred because Repondent Pilatus defectively designed or manufactured the plane.[4]

Pilatus is domiciled in Switzerland and designs and manufactures its airplanes there. Its primary aircraft is the PC-12, the plane involved in this crash. Pilatus designed the PC-12 specifically for the U.S. market, changing its original design in order to achieve FAA certification. FAA certification is necessary to sell or operate the plane in the United States, and FAA certification precludes any given state from excluding the plane from its airspace. Pilatus markets the PC-12 as an "SUV of the skies" with a range of 1,600 miles. Two-thirds of the PC-12s Pilatus has ever manufactured have been sold in the United States. In the most recent years, Pilatus has generated about half of its profits from sales of PC-12s in the United States. Capacity to operate in every state, including Pennsylvania, is critical to Pilatus's marketing strategy.

On March 22, 2007, the Petitioners filed six separate actions against Pilatus, each invoking diversity jurisdiction, alleging negligence, products liability, and breach of warranty. On November 19,

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[4] Petitioners also sued several other defendants, including the manufacturers of various component parts of the stick pusher system. The action against the other defendants was stayed pending the outcome of the appeal in the Third Circuit, and is now pending against two defendants in the District Court for the Eastern District of Pennsylvania.

2007, pursuant to the Court's consolidation order, the Petitioners collectively filed a consolidated complaint. Respondent moved to dismiss the consolidated complaint and the cross-claims of two other defendants on the ground that the Commonwealth of Pennsylvania lacked personal jurisdiction over it. Petitioners opposed the motion to dismiss, and moved, in the alternative, to transfer venue to Colorado. The district court found no personal jurisdiction in Pennsylvania or Colorado, and granted Pilatus's motion to dismiss. The Plaintiffs timely appealed.

On May 14, 2009, a panel of the Court of Appeals issued an opinion and order affirming in part and reversing in part. The panel affirmed the lower court's holding that personal jurisdiction was lacking in Pennsylvania, but vacated the order to the extent that it denied Petitioners' motion to transfer the action to Colorado. The Court remanded the case to the district court for further proceedings.

Both parties filed timely petitions for rehearing, which were denied by the Court of Appeals. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve a Significant Circuit Split Regarding Whether National Contacts Suffice To Support a State's Exercise of Specific Jurisdiciton

Since *World-Wide Volkswagen*, *Insurance Corp. of Ireland*, and *Asahi* were decided, it has become clear that the United States may, within the limits of the Fifth Amendment's due process clause, exercise

general jurisdiction over a foreign company that has minimum contacts with the United States as a whole ("national contacts"). *See* Amendments to Federal Rules of Civil Procedure, 134 F.R.D. 525, 623-25 (1991) (adopting Fed. R. Civ. P. 4(k)(2) and discussing constitutional limitations). Pilatus has such contacts, generating half its income from sales here. Thus, there is no due process Fifth Amendment bar to haling Pilatus into court in Pennsylvania, *see Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) ("The relevant forum when a case is brought under [a federal statute] is the United States."),[5] and Pilatus should have an expectation of being haled into court in Pennsylvania. Under *World-Wide Volkswagen* and *Asahi*, however, courts have reached conflicting decisions regarding whether the textually identical due process clause of the Fourteenth Amendment

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[5] While this Court adopted Fed. R. Civ. P. 4(k)(2), *see* Amendments to Federal Rules of Civil Procedure, 134 F.R.D. 525 (1991), rendering "national contacts" a presumptively constitutional basis for general jurisdiction, it has not ruled in a contested case on the constitutionality of a "national contacts" test. However, the lower courts uniformly have rejected any territorial component to the test; the only question addressed is whether fairness concerns might preclude exercise of jurisdiction in a particular venue. *See, e.g., Medical Mut. of Ohio v. deSoto*, 245 F.3d 561, 567-68 (6th Cir. 2001) (discussing cases). The idea that *Insurance Corp. of Ireland* actually did abolish territoriality considerations was bolstered by this Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, n.14 (1985), where it reiterated the waivability found in *Insurance Corp. of Ireland* and emphasized that fairness considerations are the hallmarks of due process analysis. *See also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (emphasizing that due process limitations on personal jurisdiction are matters of individual liberty).

permits or bars state exercises of *specific* jurisdiction over a defendant who has national contacts.[6]

The Third Circuit here found that the Fourteenth Amendment barred a state's exercise of specific jurisdiction over an international defendant because, despite the company's abundant national contacts, the company had not particularly targeted the State of Pennsylvania, where the harm occurred. The Sixth Circuit rejected out of hand the idea that the Fourteenth Amendment could be interpreted otherwise. *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990) ("Because the present case is a diversity action and as such does not involve a federal statute with a national service provision, we find that the District Court properly rejected the national contacts approach.").[7] The First Circuit found that an Indiana manufacturer that generated national contacts by supplying its product to Brookstone, a national retailer with a national mail order business, was not subject to specific jurisdiction in Maine absent a showing of "something

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[6] In general, what is due process under the Fourteenth Amendment is due process under the Fifth Amendment. "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring in part). *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668, n.5 (1974) (unnecessary to decide whether Fifth or Fourteenth Amendment applies to Puerto Rico, as amendments are equivalent); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (equating Fifth and Fourteenth Amendment due process); *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (noting equivalence of clauses, and applying Fourteenth Amendment doctrine to resolve Fifth Amendment claim).

[7] *But see* discussion of *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993), *infra* 18-19.

more." *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992).

The Fourth Circuit, also considering national contacts in an interstate context, resoundingly rejected the manufacture and national distribution of 10 billion asbestos-containing cigarette filters as a basis for specific jurisdiction for wrongful death caused in Maryland. *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994), *cert. den.* 513 U.S. 1151 (1995). In *Lesnick* a Maryland woman filed an action in Maryland alleging that defendants' products were responsible for causing, in Maryland, the death of her husband. The complaint alleged that:

> [F]rom March 1952 to May 1956, Lorillard [a New York corporation] manufactured Kent cigarettes with the "Micronite Filter," which contained crocidolite asbestos. The filter medium was manufactured by Hollingsworth & Vose in Massachusetts and was then shipped to Lorillard's cigarette manufacturing plants in Kentucky and New Jersey where it was incorporated into the cigarettes. Between 1952 and 1956, Hollingsworth & Vose provided Lorillard with material for approximately 10 billion asbestos-containing filters which were incorporated into cigarettes marketed and distributed by Lorillard throughout the nation.

Id. at 940.

The Fourth Circuit (Niemeyer, J.) alluded to a Circuit split and acknowledged adopting a narrow version of stream of commerce doctrine:

> While *World-Wide Volkswagen* has been cited for the proposition that personal jurisdiction may follow a product if it is delivered "into the stream of commerce with the expectation that [it] will be purchased by consumers in the forum state," *see, e.g., Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984), *Nelson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024, 104 S.Ct. 1277, 1278, 79 L.Ed.2d 682 (1984), we read the holding of the case to be much narrower, requiring purposeful activity on the part of the defendants to establish a meaningful contact with the forum state.

Id. at 944. *See also Id.* at 946, n.1 (explicating Circuit split, citing *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992) and *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990), as cases that had adopted Justice O'Connor's position in *Asahi*, and citing *Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992) and *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir. 1989), *cert. denied*, 493 U.S. 823 (1989), as cases that adopted Justice Brennan's position.). The court, relying in part on *World-Wide Volkswagen*, firmly rooted its decision in Constitutional limits on the territorial jurisdiction of a state:

> These modern principles of personal jurisdiction do not, and indeed under the Constitution could not, reorder the separate sovereignties of the states. A state's jurisdictional power remains territorial, to be exercised within its boundaries over persons, property and activities there. Rather, these principles focus on the nature and quality of contacts with the state to determine whether they justify the state's exercise of its judicial power over the person.

Id. at 943.

However, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), decided after *World-Wide Volkswagen* but before *Asahi*, this Court seemingly rejected territorial limits on state jurisdiction:

> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other states . . . .
>
> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and *the Clause itself makes no mention of federalism concerns.*

> Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement . . . .[8]

Id. at 702-03, n.10.

Implicitly adopting the view expressed in *Insurance Corp. of Ireland*, four Circuits and three state courts of last resort have rejected territorial limits in finding national contacts sufficient to establish specific personal jurisdiction.[9] Some courts struggled to fit fact patterns exhibiting national contacts into the territorial constrictions of *World-Wide Volkswagen*, sometimes ignoring them and sometimes finding nodding connections to particular states.

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[8] This seeming abolition of territoriality has been accepted and applied by the lower courts in the Fifth Amendment context, *see Medical Mut. of Ohio v. deSoto*, 245 F.3d 561 (6th Cir. 2001), *supra* n.5, but not in the Fourteenth Amendment context. In accord with *Lesnick*, *see, e.g., Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002) ("We considered the aggregation of the national contacts of an alien defendant 'neither unfair nor unreasonable' under the Fifth Amendment in light of the fact that a federal court sits as a unit of the national government and, therefore, the territorial limitations that apply to the exercise of state court jurisdiction–or, for that matter, federal jurisdiction in diversity cases, *see IMO Industries*, 155 F.3d at 258-59, are inapposite. *Max Daetwyler*, 762 F.2d at 294.")

[9] Illustrating the lack of guidance *Asahi* provides two Circuits and one state court of last resort reach that result applying the O'Connor view in *Asahi*; the other courts apply the Brennan view. *See* Section II, *infra*.

On facts strikingly analogous to those in this case, *Barone v. Rich Bros. Interstate Display Fireworks Co.*, found jurisdiction over a Japanese company in Nebraska, the place of harm, despite a lack of state-specific contacts. 25 F.3d 610 (8th Cir.), *cert. denied* 513 U.S. 948 (1994).

The plaintiff in *Barone* was injured when a fireworks display he was helping to set up went awry. The plaintiff and his employer sued the South Dakota distributor which had sold the fireworks, and two manufacturers of fireworks, one of which was Hosoya Fireworks Co. of Tokyo, Japan. Hosoya sold fireworks throughout the United States, utilizing nine distributors in six states (California, Indiana, Missouri, Ohio, Pennsylvania, and South Dakota). Those nine American distributors accounted for an average of just over seventy percent of Hosoya's fireworks business worldwide. The South Dakota distributor purchased approximately $100,000 worth of fireworks from Hosoya annually, sixteen percent of which were eventually resold into Nebraska.

The court held that personal jurisdiction in Nebraska was proper because Hosoya reaped the benefits of its distributors, and had purposefully reaped the benefits of the laws of Nebraska. *Id.* at 615. Even though the Japanese company claimed to have no actual knowledge that fireworks were distributed into Nebraska, the court said that such ignorance "defies reason and could aptly be labeled 'willful,'" in part because the location of Hosoya's distributors suggested an effort to reach much of the country through a limited number of regional distributors. *Id.* at 613. The court held that it was only reasonable and just that Hosoya should be held

accountable in the forum of the plaintiff's choice. *Id.* at 615.

Also strikingly factually analogous to the case at bar, yet yielding a different result, is *A. Uberti & C. v. Leonardo*, 892 P.2d 1354 (Ariz. 1995). There an Italian manufacturer's intent to sell its product "across America" justified a finding of jurisdiction in Arizona despite the lack of any "specific intent to market [its product] in Arizona." *Id.*, 892 P.2d at 1362-64. In that case, parents of a two-year-old who was fatally shot in a handgun accident in Tucson, Arizona, sued the Italian manufacturer of the gun in Arizona. The manufacturer knowingly and intentionally manufactured its products for the United States, and exported to the United States through its independent American distributor, knowing that its product would flow into local markets across America. The court noted:

> Defendant argues that its activities, at best, focused on the United States in general, not Arizona. Therefore, Arizona exceeds due process by asserting its jurisdiction here. Were this true, then no individual state could assert jurisdiction over Defendant simply because Defendant did not target a particular state or group of states but instead intended to sell its product to all of America. The argument turns common sense on its head. Holding that a defendant intending to sell its products to any and all citizens in the United States could not be held accountable in any jurisdiction where its products caused injury defies any

> sensible concept of due process. We have no doubt that Defendant did not care whether its guns were sold in Arizona, Massachusetts, or California, but it is quite clear that through its distributor Defendant contemplated serving the market throughout America.

Id., 892 P.2d at 1362.

In a recent case, the Fifth Circuit stretched to find a connection to a particular state in a case that dealt with national contacts through national sale and distribution, *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465 (5th Cir. 2006), with one judge concurring to urge resolution of a Circuit split. In *Luv N' Care, Ltd.* a Louisiana company sued a Colorado bottle manufacturer in Louisiana district court. The Colorado company had sold tens of thousands of bottles to Wal-Mart. Wal-Mart sent trucks to pick up the bottles from the Colorado company's Colorado Springs loading dock from which Wal-Mart transported the bottles to one of twenty-six Wal-Mart distribution centers nationwide. The vendor agreement between the Colorado company and Wal-Mart did not list Louisiana as one of the several possible destinations for the bottles, but the electronic order fulfillment system used by the Colorado company printed invoices to Wal-Mart which indicated that some bottles were bound for Louisiana. Wal-Mart shipped more than 3,000 of these bottles into Louisiana, and they were sent to Wal-Mart stores in Louisiana, repackaged under the Wal-Mart trade name. The Fifth Circuit held that the Colorado company, even if it claimed ignorance, knew that the bottles were headed for Louisiana because the destination was printed on their invoices

and thus it was "eminently foreseeable" that the bottles would reach Louisiana. *Id.* at 470-71.

In a concurring opinion, Judge DeMoss, who wrote an earlier opinion in *Ruston Gas Turbines, Inc. v. Donaldson Co.*,[10] noted a Circuit split on the Asahi issue and urged this Court to resolve it:

> Writing for the unanimous panel in *Ruston*, I described the Fifth Circuit's long-time support of the "stream of commerce" theory and rejection of the "stream-of-commerce-plus" theory . . . . In that case, application of the "stream of commerce" theory to the facts at hand led to a reasonable result, in part because *Ruston* involved more than mere placement of a product into the stream of commerce . . . . The exercise of personal jurisdiction over Insta-Mix in this case, however, stretches the stream of commerce theory to its outer limits, and thereby reveals the flaws in the stream of commerce approach.

Luv N' Care, Ltd., 438 F.3d at 474, n.1 (DeMoss, J., concurring) (citations omitted).

---

[10] In *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415 (5th Cir. 1993), the court found specific jurisdiction in Texas over a Minnesota supplier. The supplier intentionally placed its products into the stream of commerce by delivering them to a shipper destined for delivery in Texas. At the time the goods left the supplier's plant in Minnesota, the supplier not only *could have foreseen* that the products might end up in Texas, it *knew* that the products were going to be delivered to Texas. The court noted that it had "rejected the 'stream-of-commerce-plus' theory advocated by the *Asahi* plurality." *Id.* at 420.

National contacts was equated with purposeful availment "of the vast, lucrative markets of *each state* in the United States" in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 543 (6th Cir. 1993) (emphasis added). The plaintiff filed a products liability claim in Kentucky against the Dutch manufacturer of a drug distributed nationwide by an American company. Like the Pilatus PC-12 in the case at bar, the product was designed for the U.S. market, the Dutch manufacturer sought and approved regulatory approval to sell the product in the United States, and like Pilatus, the Dutch manufacturer used a distributor that would market the drug throughout the United States. *Id.* at 543-44. The Sixth Circuit, found that these factors indicated intent to serve "each state," including the forum state of Kentucky. *Id.* at 544.

The West Virginia Supreme Court of Appeals similarly found that a Japanese manufacturer of a tainted drug which allegedly caused plaintiff's blood disorder should have an expectation of being haled into court in West Virginia. *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609 (W. Va. 1992). The manufacturer solicited business in West Virginia through a distributor and derived substantial benefit from the use of its product in that state. "Given the distribution pattern of the product, this and the many other lawsuits filed as a result of the use of the contaminated L-tryptophan cannot come as a surprise." *Id.* at 616 (citing *Asahi*, 480 U.S. at 117).

National and international marketing and sales also served as the basis for New York's exercise of personal jurisdiction over a Japanese manufacturer in *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d

Cir. 1999). The Japanese manufacturer's machine caused plaintiff's injuries in New York after the manufacturer's distributor in Pennsylvania sold the machine to plaintiff's employer in New York. The Second Circuit held that an "exclusive sales rights" agreement between the Japanese manufacturer and the Pennsylvania company contemplated that the Pennsylvania company would sell the machines in North America and throughout the world, and served as evidence of the Japanese company's attempt to serve the New York market, albeit indirectly. *Id.* at 242-44.

Relying in part on national contacts and in part on the fact that the company specifically designed its products to meet federal safety standards—both factors present in the case at bar—the Alabama Supreme Court reached the opposite result from the Third Circuit here and found jurisdiction over a Korean manufacturer. *Ex parte DBI, Inc.*, --- So.3d ---, 2009 WL 1164959 (Ala. May 1, 2009). A Korean seat belt manufacturer was sued for damages when one of its seat belts malfunctioned and a passenger was ejected from a car after a car crash, resulting in her death.

> DBI knew that its seat belts were incorporated into automobiles sold by Kia Motors in the United States. It is not subject to reasonable dispute that it is generally known that a product such as a mass-produced automobile is marketed on a broad spectrum and is not a boutique product fit for only a narrow class of consumers. Likewise, an automobile manufacturer is involved in the sales of its products on a national as

> opposed to a regional basis. Perhaps the supplier of a part to a snow-plow manufacturer could reasonably say it did not anticipate that its product would be sold in Alabama, but, clearly, moderately priced, fuel-efficient automobiles, such as those manufactured by Kia Motors, are destined for sale in all 50 states in this country. Kia Motors has nine dealerships in Alabama. DBI, by choosing to enter into a contractual relationship with Kia Motors pursuant to which DBI would turn a profit by supplying an essential component part vital to the safety of passengers for such automobiles under the circumstances here described, cannot reasonably assert ignorance of these realities of the marketplace.
>
> In selling seat belts compliant with the FMVSS to Kia Motors, DBI should have foreseen that a certain percentage of the automobiles manufactured by Kia Motors would be distributed to the Kia dealerships in Alabama and sold in Alabama. Therefore, we hold that it would have been reasonable for DBI to anticipate being haled into court in Alabama. Indeed, DBI purchased insurance to protect itself in such event.

Id. at *19, *20.

II. This Court Should Resolve the Lingering Split Within the *Asahi* Decision and Answer the Important Question of Federal Law

The lack of guidance from this Court in *Asahi* is demonstrated by the case law discussed here. At least three courts (Alabama–*Ex parte DBI, Inc.*, --- So.3d ----, 2009 WL 1164959 (Ala. May 1, 2009); Seventh Circuit–*Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); and Eighth Circuit–*Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-15 (8th Cir. 1994); and *Clune v. Alimak*, 233 F.3d 538 (8th Cir. 2000)) found jurisdiction using national contacts and applying the Brennan test; at least two other courts (Arizona–*A. Uberti and C. v. Leonardo*, 892 P.2d 1354 (Ariz. 1995); and Eleventh Circuit–*Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993)) applied the O'Connor test, but also found that national contacts supported jurisdiction even when the particular state was not specifically targeted. Still two other courts have used national contacts to support a finding of personal jurisdiction while adopting neither the Brennan nor O'Connor approach (Second Circuit–*Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir. 1999) and Federal Circuit–*Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994)). And one recent state intermediate court of appeals used the Brennan test and national contacts to support *general* jurisdiction over a foreign defendant. *Brown v. Meter*, 681 S.E.2d 382 (N.C. App. 2009) (using national contacts and Brennan's stream of commerce test as a basis for *general* jurisdiction). This Court should provide guidance to the lower courts on the question of whether aiming a stream of commerce at the

United States as a whole suffices to create specific jurisdiction in the place where harm occurs.

Which test was applied made a clear difference in Alabama. There, using Justice O'Connor's "stream of commerce plus" theory, the Alabama Supreme Court in 2003, held that a UK wheel manufacturer did not have sufficient contacts with the State of Alabama to be sued there. *Ex parte Alloy Wheels International, Ltd.*, 882 So.2d 819, 827 (Ala. 2003). The wheel manufacturer designed its wheels to meet federal motor vehicle safety regulations, supplied wheels to Land Rover in the UK for use on vehicles to be exported to the United States with the markings required by U.S. regulations, those cars were sold to American car companies like Ford and General Motors for sale in the United States, and the wheel manufacturer even had an American subsidiary to handle marketing and customer relations with car companies in the United States. *Id.* at 824-26. But because the plaintiff did not submit "substantial evidence that Alloy Wheels purposefully directed any action at the forum State other than the mere act of placing a product in the stream of commerce," the court held that there was no personal jurisdiction over the wheel manufacturer. *Id.* at 826 (citation and quotation omitted). Six years later, in *Ex parte DBI, Inc.*, --- So.3d ----, 2009 WL 1164959 (Ala. May 1, 2009), discussed above, the court overruled *Alloy Wheels*, adopted the Brennan view, and found jurisdiction over a foreign manufacturer on the basis of national contacts.

Without direction from this Court, the Minnesota Supreme Court has gone its own way, applying its own pre-*Asahi* five-factor approach to establishing

specific jurisdiction. *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 571-72 (Minn. 2004). The Court in *Juelich* found that, because of the lack of a clear opinion in *Asahi*, it was error for an intermediate appellate court to adopt the O'Connor view. The court observed, "Far from clarifying the stream-of-commerce theory, the *Asahi* decision has led to different stream-of-commerce analyses being applied to similar sets of facts." *Id.* at 572, n.6.

In the case at bar, clarification of jurisdictional standards affects the significant interests of Pennsylvania in providing remedies to persons injured within its borders, PA. CONST. art. 1, § 11 ("[E]very man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . . ."), and in holding wrongdoers accountable to the state for harm they might cause. For example, the same standards of personal jurisdiction as apply in this case apply to the questions of whether Pennsylvania could summon Pilatus to a coroner's inquiry into the cause of death of the persons killed, *see* 16 P.S. § 1245; *Pennsylvania v. Anderson*, 385 A.2d 365 (Pa. Super. 1978) or to account for damages, if toxic waste had been spilled at the crash site. *See* 35 Pa. C.S.A. § 7103 (authorizing emergency responses to such events) and 35 P.S. § 6022.102(2), (8) (providing for the state to recover certain response costs).

With doctrinal confusion high, results unpredictable, and important state interests in the balance, action by this Court is called for.

CONCLUSION

As the Eighth Circuit observed over a decade ago in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994):

> Although a generation has not quite passed since *World-Wide Volkswagen* was decided, the acceleration in the internationalization of commerce is apparent. In this age of NAFTA and GATT, one can expect further globalization of commerce, and it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states.

That observation is wholly consistent with this Court's observation in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), that what is fundamentally fair with regard to establishing personal jurisdiction over a participant in commerce must be judged in light of the extant commercial environment:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve

> parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id., 355 U.S. at 222-23. Since *World-Wide Volkswagen*, *Insurance Corp. of Ireland*, and *Asahi* were decided context once again has shifted.[11]

The world economy has changed radically since this Court last made a major pronouncement on these issues. Inconsistency of lower court application of existing doctrine requires clarification of doctrine by this Court.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

October 22, 2009

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[11] *See* n.1, *supra*.

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APPENDIX

TABLE OF CONTENTS

APPENDIX A: Opinion of the United States District Court for the Eastern District of Pennsylvania (April 30, 2008) 1a

APPENDIX B: Opinion of the United States Court of Appeals for the Third Circuit (May 14, 2009) 29a

APPENDIX C: Amended Opinion of the United States Court of Appeals for the Third Circuit (June 24, 2009) 64a

APPENDIX D: Order of United States District Court for the Eastern District of Pennsylvania on Remand from the United States Court of Appeals for the Third Circuit (October 1, 2009) 68a

APPENDIX E: Memorandum Opinion of United States District Court for the Eastern District of Pennsylvania on Remand from the United States Court of Appeals for the Third Circuit (October 1, 2009) 70a

APPENDIX F: Order Denying D'Jamoos' Petition for Rehearing En Banc (June 24, 2009) 78a

APPENDIX G: Order Denying Pilatus' Petition for Rehearing En Banc (June 24, 2009) 81a

APPENDIX H: PA. CONST. art 1, § 11 ..... 84a

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (APRIL 30, 2008)

United States District Court,
E.D. Pennsylvania.

Theresa D'JAMOOS, as Executrix of the Estate of Dawn Elizabeth Weingeroff, et al.
v.

PILATUS AIRCRAFT LTD., et al.

Civil Action No. 07-1153.

April 30, 2008.

Anthony Tarricone, Kreindler & Kreindler, Boston, MA, Sol H. Weiss, Bernard W. Smalley, Anapol Schwartz Weiss Cohan Feldman & Smalley PC, Philadelphia, PA, Mark B. Decof, Decof & Decof, P.C., Providence, RI, Patrick T. Jones, Peter J. Schneider, Cooley Manion Jones LLP, Boston, MA, for Plaintiffs.

Bruce J. Berman, Mcdermott Will & Emery LLP, Miami, FL, J. Bruce Mckissock, Marshall Dennehey Warner Coleman & Goggin, Philadelphia, PA, Jeffrey Baltruzak, Jeffrey A. Rossman, Mcdermott Will & Emery LLP, Chicago, IL, Alexander Ewing, Jr., Alfred A. Gollatz, Matthew J. Norris, Gollatz Griffin & Ewing PC, West Chester, PA, James C. Stroud, Rawle & Henderson, Philadelphia, PA, for Defendants.

MEMORANDUM AND ORDER

McLAUGHLIN, District Judge.

*1 The plaintiffs represent the estates of six people killed in a plane crash near State College, Pennsylvania, on March 26, 2005. The defendants manufactured the plane and some of its components. The plaintiffs allege that the plane's systems and components were defective, and that the failure of one or more of the plane's systems and components caused the crash. Defendant Pilatus Aircraft Ltd. ("Pilatus"), which manufactured the plane, has moved to dismiss the plaintiff's complaint for lack of personal jurisdiction. The plaintiffs have filed a motion to transfer the case to the Federal District of Colorado. The Court will grant Pilatus's motion to dismiss and deny the plaintiff's motion to transfer. The Court will also grant Pilatus's motion to dismiss the cross-claims of its co-defendants Rosemount Aerospace, Inc. and Goodrich Corporation.

I. *Facts*

On March 26, 2005, the pilot and five passengers boarded a single-engine turbo-prop plane in Naples, Florida, bound for the University Park Airport in State College, Pennsylvania. Jeffrey Jacober piloted the plane, and the passengers were Dawn Elizabeth Weingeroff, Gregg C. Weingeroff, Leland Weingeroff, Eric Jacober, and Karen Jacober. Jeffrey Jacober lost control of the aircraft during the approach to University Park Airport. All six people on board were killed in the crash. Cons.Compl. ¶ 46, 48.

Defendant Pilatus [FN1], a Swiss corporation,

manufactured the Pilatus PC-12 with serial number 299 in Switzerland in 1999. Pilatus sold the plane to a French company, which sold it to a Swiss company. The plane's Swiss owners requested that Pilatus perform some maintenance on the plane in Switzerland. The Swiss owners then sold it to a Massachusetts company, which sold the plane to a Rhode Island LLC, which owned the plane at the time of the crash. The six people killed in the crash were Rhode Island citizens. *Id.* ¶¶ 1, 19-22, 24; Def.'s Mot. to Dismiss Br. Ex. A, Affirm. of John Senior ¶¶ 22-23.[FN2]

FN1. Pilatus is a single entity sued under both its English and German names (Pilatus Aircraft, Ltd., and Pilatus Flugzeugweke Aktiengesellschaft).

FN2. Hereafter "Def.'s Br."

Pilatus has been building single-engine planes at its headquarters in Stans, Switzerland, since 1939. It currently makes and sells two general aviation products, the PC-6 and the PC-12. Pilatus has no offices or employees in the United States, and it does not advertise its products in the United States. It has three subsidiaries, one of which is in the United States: Pilatus Business Aircraft, Ltd. ("PilBAL"). PilBAL is located in Broomfield, Colorado, and markets and sells PC-12 planes throughout the Western hemisphere. PilBAL purchases PC-12s from Pilatus and sells them to a network of independent dealers. These dealers then market and sell the planes to retail customers. The PilBAL dealer that serves the Mid-Atlantic region, including Pennsylvania, is called SkyTech, Inc., and is located in Baltimore, Maryland. Def.'s Br. Ex. A ¶ ¶ 3, 5, 6-

8(c), 10, 13-14, 18.

According to Pilatus, it has had two direct contacts with Pennsylvania. In the early 2000s, Pilatus sent two engineers to visit Innovative Solution & Support in Exton, Pennsylvania, to investigate whether it might be a good source for displays. Pilatus did not select the company as a supplier. Pilatus has also purchased goods and services from Pennsylvania, with expenses ranging from approximately $120,000 per year to $330,000 per year for the past five years. This accounts for less than 1% of Pilatus's purchases in each of the last five years. *Id.* ¶¶ 17-18.

*2 In order to receive Federal Aviation Administration ("FAA") certification that would allow the plane to be registered and flown in the United States, Pilatus equipped its PC-12 planes with a stick-pusher system that is supposed to prevent the plane from stalling and entering a spin. A spin creates a significant risk of loss of control and crashing. The FAA issued a Type Certificate for the Pilatus PC-12 planes requiring them to be equipped with a stick-pusher system. The subject aircraft had such a system. Cons.Compl. ¶¶ 15-18.

The plaintiffs allege that the plane crashed because of the failure of the stick-pusher system and/or the plane's other components or systems. The other defendants manufactured these other components or systems: Rosemount Aerospace, Inc. ("Rosemount") designed and manufactured the angle-of-attack transmitters, which detect and transmit data to the stick-pusher computer; Goodrich Avionics Systems, Inc. and/or its successor, L-3 Communications Corporation ("Goodrich Avionics defendants"), designed and manufactured the stick-pusher servo,

which performs the stick-pushing function; and Goodrich Corporation designed and manufactured the de-icing system for the subject aircraft.[FN3] *Id.* ¶¶ 27-45.

> FN3. The consolidated complaint names two other defendants: Revue Thommen AC and EMCA. Revue Thommen AC and EMCA were dismissed without prejudice in December of 2007 (Docket Nos. 34 and 35). At the oral argument on March 6, 2008, the plaintiffs' counsel said that the plaintiffs intended to dismiss Goodrich Corporation and that a stipulation would be forthcoming. No such stipulation has been entered on the docket, and the Court will proceed on the assumption that Goodrich Corporation is still a defendant. Oral Arg. Tr. at 56-57, Mar. 6, 2008.

The plaintiffs assert wrongful death, survival, and punitive damages counts against all of the defendants. On March 22, 2007, the plaintiffs filed six separate actions against the defendants alleging negligence, products liability, and breach of warranty. On November 19, 2007, pursuant to the Court's consolidation order, the plaintiffs collectively filed a consolidated complaint. Defendant Pilatus has moved to dismiss the consolidated complaint.

II. *Pilatus's Motion to Dismiss*

Defendant Pilatus has filed a motion to dismiss for lack of personal jurisdiction, or alternatively, motion to dismiss for failure to state a claim, motion for a more definitive statement, and motion to strike. Because the Court will grant the motion to dismiss for lack of personal jurisdiction, it will not address

the alternative grounds for dismissal.

A. *Legal Standard*

In deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(2), the Court accepts all of the plaintiff's allegations as true and construes disputed facts in favor of the plaintiff. *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002). Once a defendant has raised a jurisdictional defense, however, the burden shifts to the plaintiff to prove, by a preponderance of the evidence, that jurisdiction exists in the forum state. *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 257 (3d Cir.1998); *Carteret Sav. Bank. F.A. v. Shushan*, 954 F.2d 141, 146 (3d Cir.1992). The plaintiff may not rest solely on pleadings to satisfy its burden. *Carteret*, 954 F.2d at 146. The plaintiff must present a prima facie case with evidence that demonstrates, with reasonable particularity, a sufficient nexus between the defendant and the forum state. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir.2004); *Mellon Bank v. Farino*, 960 F.2d 1217, 1223 (3d Cir.1992).

B. *Personal Jurisdiction*

*3 To exercise personal jurisdiction over a defendant, a federal court sitting in diversity makes a two-step inquiry. First, it looks to whether the state long-arm statute allows the exercise of personal jurisdiction. The court then determines if the exercise of jurisdiction comports with the Due Process Clause of the Constitution. *IMO Indus.*, 155 F.3d at 258-59; *Pennzoil Prods. Co. v. Colleli & Assocs., Inc.*, 149 F.3d 197, 200 (3d Cir.1998).

Under Rule 4(k) of the Federal Rules of Civil

Procedure, a federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state. *See Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n,* 819 F.2d 434, 437 (3d Cir.1987); Fed.R.Civ.P. 4(k)(1)(A). Pennsylvania law provides for jurisdiction "to the fullest extent allowed under the Constitution of the United States" and "based on the most minimum contact with [Pennsylvania] allowed under the Constitution of the United States." 42 Pa. Cons.Stat. § 5322(b).

Under the Due Process Clause, a court may not exercise jurisdiction over a nonresident defendant unless there are minimum contacts between the defendant and the forum state "such that the maintenance of suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Remnick v. Manfredy,* 238 F.3d 248, 255 (3d Cir.2001).

Pilatus has moved to dismiss the complaint for lack of personal jurisdiction. The plaintiffs contend that the Court has both specific jurisdiction and general jurisdiction over Pilatus. The Court finds that it has neither specific nor general jurisdiction over Pilatus and will grant the motion to dismiss.

1. *Specific Jurisdiction*

Specific jurisdiction exists when a defendant has purposely directed his activities at the forum state and the claim arises from or relates to that conduct. *Marten v. Godwin,* 499 F.3d 290, 296 (3d Cir.2007); *Mellon Bank (East) PSFS, Nat'l Assoc. v. Farino,* 960 F.2d 1217, 1220 (3d Cir.1992).

Pennsylvania's long arm statute has a "tort out/harm in" provision which extends personal jurisdiction over a person who causes harm or tortious injury in the Commonwealth by an act or omission outside of the Commonwealth. 42 Pa. Cons.Stat. § 5322(a) (4). This section applies to parties who are not within the general jurisdiction statute. *Id.* at (b). Pilatus and the plaintiffs agree that section 5322(a)(4) applies in this case: the plaintiffs allege that Pilatus has caused harm in Pennsylvania (the plane crash) by acts or omissions outside of Pennsylvania (the flawed manufacture and/or design of the plane in Switzerland).[FN4] Def.'s Reply at 4; Pls.' Opp. at 2.

> FN4. *Pennzoil* clarified that the statute applies to negligence and recklessness, as well as to intentional torts. 149 F.3d at 201.

After a court determines that section 5322(a)(4) of the long-arm statute applies, it must still determine whether due process is satisfied: does the party have minimum contacts with the forum and would the exercise of jurisdiction comport with notions of fair play and substantial justice. *See Pennzoil,* 149 F.3d at 202 ("We cannot presume that jurisdiction is proper simply because the requirements of a long-arm statute have been met.").

*4 The *Pennzoil* court cautioned that the minimum contacts question turns on the quality and nature of a defendant's activity in relation to the forum. The court observed that if a nonresident defendant's contact with the forum was merely fortuitous or the result of a single transaction, the minimum contacts requirement was not satisfied. *Id.* at 203 (citing *Max Daetwyler Corp. v. R. Meyer,* 762 F.2d 290, 298 (3d

Cir.1985)). In cases where the production or sale of goods is at issue, the court held that the "mere foreseeability" that a product one sells might end up in the forum state does not render the seller amenable to suit there. *Id* . (citing *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 279 (3d Cir.1994)). A minimum contacts finding demands an act by which the defendant "purposefully availed itself of the privilege of conducting business within the forum State, thus invoking the protection and benefits of its laws." *Id.* (quotations omitted).

The plaintiffs argue that the Court should find specific jurisdiction over Pilatus under a stream of commerce theory. The stream of commerce theory is used in products liability cases when a product's seller has not come in direct contact with the forum state but does so through retailers, distributors, and other intermediaries. A court may exercise jurisdiction over a nonresident defendant that "injected its goods, albeit indirectly, into the forum state" and either derived a substantial benefit from the forum or had a reasonable expectation of driving a substantial benefit from it. *Pennzoil*, 149 F.3d at 203-04; *Max Daetwyler*, 762 F.2d at 300; *Simeone v. Bombardier-Rotax GMBH*, 360 F.Supp.2d 665, 670 (E.D.Pa.2005).

In *Asahi Metal Indus. Co., Ltd. v.Super. Ct. of Cal., Solano County*, 480 U.S. 102, 112, 117, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the United States Supreme Court presented three different tests for purposeful availment through the stream of commerce (Justices O'Connor and Brennan each wrote for pluralities of four, and Justice Stevens wrote a concurrence). The *Pennzoil* court applied the two *Asahi Metal* plurality standards in its stream of

commerce analysis. The first, Justice O'Connor's standard, requires that the placement of a product in the stream of commerce be accompanied by additional conduct of the defendant that indicates an intent or purpose to serve the market in the forum state. The second, Justice Brennan's standard, requires that a defendant place goods in the stream of commerce and benefit economically from the sale of the final product in the forum state. *Asahi Metal,* 480 U.S. at 112, 117; *Pennzoil,* 149 F.3d at 206-07.

By either of these standards, the *Pennzoil* court held, the defendant had purposefully availed himself of the laws of Pennsylvania. The defendant sold a solvent to crude oil producers in Ohio. The oil producers sold the oil to refineries, including the plaintiff's refinery in Pennsylvania, and the plaintiff claimed that its equipment was damaged by the solvent. Most of the oil from the Ohio producers was sold to Pennsylvania refineries, the defendant knew that the oil was going to Pennzoil's refinery, and the defendant had previously sent samples of its solvents to laboratory personnel at the Pennzoil refinery to preclude contamination problems. The court concluded that under either the O'Connor or Brennan tests, the defendant had purposefully availed itself of the laws of Pennsylvania by deriving financial benefit from its customers' sale of crude oil to refineries in Pennsylvania. *Pennzoil,* 149 F.3d at 206-07.

*5 According to the plaintiffs, Pilatus is subject to jurisdiction under *Pennzoil* because it placed its aircraft into the stream of commerce with the intent to exploit the United States market. Pilatus manufactured the subject aircraft in Switzerland and sold it to a French company, which resold it to a

Swiss company, which resold it to a Massachusetts company, which resold it to a Rhode Island company, which owned the plane at the time of the crash. Pilatus was not involved in any of the re-sales of the plane. It has no physical presence in Pennsylvania and has made no direct sales of any of its products to Pennsylvania in the last five years. Pilatus has had two direct contacts with Pennsylvania in the last five years: two Pilatus engineers visited a company in Exton, Pennsylvania to see if it could supply Pilatus with displays; and Pilatus has purchased equipment and services from Pennsylvania amounting to less than 1% of its total purchases for each year of the last five years. Def.'s Br. at 4, Ex. A ¶¶ 16.

The plaintiffs cite *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), to support their contention that when a foreign corporation establishes a marketing scheme and distribution system to target United States citizens as the principal purchasers of its products, it has clear notice that it is subject to suit. In *Woodson*, however, the United States Supreme Court held that a retail car dealer and local distributor that served New York, New Jersey, and Connecticut was not subject to jurisdiction in Oklahoma because a single car sold by the dealer to a New York resident happened to suffer an accident while driving through Oklahoma. Without evidence that the defendants tried to serve the Oklahoma market, the single, isolated incident was insufficient to support jurisdiction. This single, isolated incident involving a product that Pilatus sold in Europe is not enough to support jurisdiction in Pennsylvania.

Pilatus does not have the minimum contacts with Pennsylvania necessary to comply with due process

requirements under the Constitution. It has not purposefully availed itself of the privilege of conducting business within Pennsylvania. Under either of the *Asahi* stream of commerce tests laid out in *Pennzoil*, Pilatus has not injected its goods into the forum state with a reasonable expectation of deriving a substantial benefit.

Under Justice O'Connor's test, placement of a product into the stream of commerce must be accompanied by additional conduct that may indicate an intent or purpose to serve the market in the forum state, including designing the product for that market, advertising in the forum, establishing channels to provide regular advice to customers in the forum, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum. *Asahi Metal*, 480 U.S. at 112. Pilatus has done none of these things: it does not design its planes for customers in Pennsylvania or provide them with advice; it does not advertise in Pennsylvania; and it does not market its planes through a distributor which has agreed to act as a sales agent in Pennsylvania.

*6 Pilatus does not meet Justice Brennan's less stringent stream of commerce test from *Asahi Metal*. Justice Brennan wrote that as long as a participant in the distribution chain is aware that the final product is being marketed in the forum state, the possibility of a lawsuit should not be a surprise. He concluded that a defendant who has placed goods in the stream of commerce and benefits economically from the retail sale of the final product in the forum state may be subject to jurisdiction whether or not the defendant directly conducts business there. *Asahi Metal*, 480 U.S. at 117. Pilatus's business

involves selling PC-12 planes outright to PilBAL, its subsidiary. PilBAL then sells the planes to independent dealers, including SkyTech. The dealers handle sales to retail buyers by separate contract. Neither Pilatus nor PilBAL are aware of the sales to retail buyers that take place after the dealers buy the planes, and neither Pilatus nor PilBAL have sold any new or used Pilatus aircraft in Pennsylvania in the last five years. Pilatus, PilBAL, and SkyTech do not have any physical presence or connection to Pennsylvania: Pilatus is in Switzerland; PilBAL is in Colorado; and SkyTech is in Maryland. Pilatus is not the first link in a supply chain of products destined for Pennsylvania; rather, it is several degrees removed from an independent dealer who has sold several planes-not including the subject aircraft-to individual retail customers in Pennsylvania.[FN5] Def.'s Reply Br. Ex. B ¶¶ 6, 8, 12.

> FN5. Pilatus does not keep track of the number of PC-12s that SkyTech has sold, but a review of its owner-operator list shows that six PC-12s currently have an owner-operator address in Pennsylvania. Def.'s Reply Br. Ex. B. ¶ 12.

In *Pennzoil,* the defendant knew when he sold solvents to Ohio oil producers that most of the oil would be sold to Pennsylvania refineries, including Pennzoil. He also had a history of problems with the plaintiff refinery and sent samples of solvents to that refinery to preclude future problems. *Pennzoil,* 149 F.3d at 206. This is a very different situation from the instant case, in which a foreign corporation sold its product in Europe, and the product, through repeated resales wholly disconnected from the manufacturer, made its way to the United States,

where its final sale took it to Rhode Island.

The stream of commerce tests for minimum contacts are therefore not entirely apposite in this case, because the subject aircraft did not enter Pennsylvania through any stream of commerce. The plane's only connection to Pennsylvania was that it was flying over Pennsylvania and attempting to land at a Pennsylvania airport when it crashed. As discussed above, Pilatus sold the subject plane in Switzerland in 1999; subsequent owners then sold and re-sold the plane in Europe and the United States several times before the crash. There is no evidence that Pilatus knew that the plane might end up in Rhode Island, the location of the plane's final owners, much less that the plane would wind up crashing while flying over Pennsylvania, a state to which Pilatus had only the most fleeting connections. *See Simeone v. Bombardier-Rotax GMBH,* 360 F.Supp.2d 665, 672 (E.D.Pa.2005) (holding that although the defendant did have an extensive distribution network that would subject it to jurisdiction in Pennsylvania, the product in question did not reach Pennsylvania through that network, and therefore there was not a sufficient nexus between the defendant and Pennsylvania to subject the defendant to specific jurisdiction).

*7 Specific jurisdiction exists where a defendant purposefully directs his activities at a forum and the harm arises out of or is related to those activities. *B.P. Chems. Ltd. v. Formosa Chem. & Fibre Corp.,* 229 F.3d 254, 259 (3d Cir.2000). The plaintiffs argue that an allegation under 42 Pa. Cons.Stat. § 5322(a)(4), the "tort out, harm in" provision of the Pennsylvania long-arm statute, is sufficient to establish specific jurisdiction. Pl.'s Sur-Reply Br. at

4. They cite *Pennzoil* for the proposition that the statute "simply extends jurisdiction to anyone that causes harm or tortious injury ... in Pennsylvania through acts or omissions outside Pennsylvania." *Pennzoil*, 149 F.3d at 201-02. This is certainly true as far as it goes; the *Pennzoil* court also said that courts "cannot presume that jurisdiction is proper simply because the requirements of a long-arm statute have been met." *Id.* at 202.

Both parties agree that the long-arm statute is satisfied and that section 5322(a)(4) is the applicable section. The minimum contacts analysis, though, turns on the quality of a defendant's activity in relation to the forum state. *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 298 (3d Cir.1985). Pilatus put the subject aircraft into the stream of commerce with no knowledge that it might wind up in Pennsylvania. Pilatus extracted no economic benefit from the sale of the subject aircraft in Pennsylvania; the aircraft was never sold in Pennsylvania. The final sale, many steps removed from Pilatus, brought the plane to Rhode Island. The United States Court of Appeals for the Third Circuit has repeatedly cautioned that a fortuitous contact will not satisfy the minimum contacts requirement, and with regard to producers and sellers of goods, the "mere foreseeability" that a product may end up in the forum state does not render the seller amenable to suit there. *Id.* at 295; *Pennzoil*, 149 F.3d at 203 (citing *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 279 (3d Cir.1994)).

Pilatus does not have the required minimum contacts with Pennsylvania to sustain a finding of specific jurisdiction.

2. *General Jurisdiction*

General jurisdiction allows a party to be haled into court in a forum whether or not the cause of action has any connection to the forum. For a court to have general jurisdiction over a nonresident party, the party's contacts with the forum must be continuous and systematic, and the contacts must be a central part of the defendant's business. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414-15 & n. 8, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Marten v. Godwin,* 499 F.3d 290, 296 (3d Cir.2007); *Pennzoil,* 149 F.3d at 200; *Provident Nat'l Bank v. Cal. Fed. Savings & Loan Assoc.,* 819 F.2d 434, 437-38 (3d Cir.1987). The Pennsylvania general jurisdiction statute allows for the exercise of general personal jurisdiction over corporations "carrying on a continuous and systematic" business in Pennsylvania. 42 Pa. Cons.Stat. § 5301.

*8 Neither Pilatus nor its subsidiary in the United States, PilBAL, have continuous and systematic contacts with Pennsylvania sufficient for general jurisdiction.[FN6] Neither Pilatus nor PilBAL has a physical presence, mailing address, phone number, employee, shareholder, or bank account in Pennsylvania. Neither company has owned or leased real property, filed taxes, or incorporated in Pennsylvania. Neither Pilatus nor PilBAL has advertised in Pennsylvania (PilBAL has advertised in the United States through advertisements in magazines with nationwide circulation). *See BP Chem. Ltd.,* 229 F.3d at 254 (concluding that a foreign corporation that exported products to the United States but had no personnel or facilities and did not solicit business here did not have continuous and systematic contacts); *Kimball v. Countrywide Merchant Servs.,* No. 04-3466, 2005 WL 318752, at

*3 (E.D.Pa. Feb.8, 2005) (finding that the defendants lacked continuous and systematic contacts because of minimal sales in Pennsylvania, no employees or advertising in Pennsylvania, and no ownership of property in Pennsylvania). Def.'s Reply Br. Ex. A, Senior Aff. ¶¶ 9-10; Ex. B, Geisshuesler Aff. ¶ 14.

> FN6. PilBAL is a wholly owned subsidiary of Pilatus. A subsidiary is considered the alter ego of its parent only if the parent exercises control over the subsidiary's activities. *Simeone v. Bombardier-Rotax GmbH*, 360 F.Supp.2d 665, 675 (E.D.Pa.2005); *Arch v. Am. Tobacco Co.*, 984 F.Supp. 830, 837 (E.D.Pa.1997). The Court need not conduct a full alter ego analysis under Pennsylvania law because neither Pilatus nor PilBAL has enough contacts with Pennsylvania for the Court to exercise personal jurisdiction. Even if the Court were to find that PilBAL was the alter ego of Pilatus, the jurisdictional decision would be the same. The Court will analyze whether PilBAL is an alter ego of Pilatus under Colorado law when it addresses the plaintiff's motion to transfer, below.

Neither company has made any direct sales to Pennsylvania in the last five years: Pilatus sells planes to PilBAL, in Colorado, and PilBAL sells planes to a series of independent distributors serving various regions in the Western hemisphere, including SkyTech. SkyTech serves the Mid-Atlantic region of the United States, including Pennsylvania, but is located in Maryland. Foreign companies are not insulated from the acts of their independent distributors in a specific jurisdiction analysis, but general jurisdiction requires greater contacts with

the forum state. Sales by an independent distributor do not normally constitute contacts of a manufacturer. *See Keunzle v. HTM Sport-Und Freizeitgerate AG,* 102 F.3d 453, 458 (10th Cir.1996); *see also Cambridge Literary Prop., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H.,* 295 F.3d 59, 63 n. 3 (1st Cir.2002) (noting that sales by an independent distributor or a separately incorporated subsidiary do not typically constitute contacts of the manufacturer or the parent corporation). SkyTech is a contracted party otherwise unaffiliated with Pilatus or PilBAL. The dealer agreement between PilBAL and SkyTech stipulates that SkyTech cannot bind or represent PilBAL and that the parties are independent contractors. In *BP Chem. Ltd. v. Formosa Chem. & Fibre Corp.,* 229 F.3d 254, 261 (3d Cir.2000), the United States Court of Appeals for the Third Circuit found that contracting with an entity in the forum was not sufficient to establish minimum contacts. Def.'s Reply Br. Ex. A, Senior Aff. ¶¶ 10-12; Ex. B, Geisshuesler Aff. at ¶ 8.

The plaintiffs argue that the Court has general jurisdiction over Pilatus because PilBAL is in the United States and coordinates the marketing, sales, and servicing activities for the PC-12 aircraft in the Western hemisphere. The plaintiffs also claim that the United States is the single largest market for the PC-12 model, there are 630 PC-12 aircraft registered in the United States, including seven in Pennsylvania, and PilBAL generates the largest share of the Pilatus Group's revenue. Pl.'s Opp. at 2-3.

*9 There are two major problems with the plaintiffs' analysis. First, the plaintiffs focus on Pilatus's contacts in the United States as a whole, rather than

its contacts with Pennsylvania. PilBAL is in Colorado, not Pennsylvania, and the distributor it contracts with to sell the planes is in Maryland. The plaintiffs seek to turn Pilatus's contacts with other states into jurisdiction in Pennsylvania. These national contacts are not relevant to the personal jurisdiction analysis in a diversity case. The United States Court of Appeals for the Third Circuit has held that the national contacts test applies in federal question cases where the federal statute at issue allows for nationwide service of process. *Max Daetwyler Corp. v. Meyer,* 762 F.2d 290, 297 (3d Cir.1985). In diversity cases it is the defendant's contacts with the forum state, rather than with the United States as a whole, that are relevant to the personal jurisdiction analysis. *See, e.g., Reers v. Deutsche Bahn AG,* 320 F.Supp.2d 140, 155 (S.D.N.Y.2004).

The second problem with the plaintiffs' analysis is that it seeks to inject the stream of commerce theory into the general jurisdiction context. The stream of commerce theory, discussed above in the analysis of specific jurisdiction, is a means of sustaining jurisdiction in products liability cases in which the product has traveled through a distribution chain before reaching the consumer. *See Renner v. Lanard Toys Ltd.,* 33 F.3d 277, 280 (3d Cir.1994). The plaintiffs claim that general jurisdiction exists over Pilatus because Pilatus products wind up in Pennsylvania through a distribution chain. The stream of commerce theory, however, provides no basis for exercising *general* jurisdiction over a nonresident defendant. *See Purdue Research Found. v. SanofiSythelabo, S.A.,* 338 F.3d 773, 788 (7th Cir.2003); *Alpine View Co. Ltd. v. Atlas Copco AB,* 205 F.3d 208, 216 (5th Cir.2000) ("We have

specifically rejected a party's reliance on the stream of commerce theory to support asserting general jurisdiction over a nonresident defendant."); *Simeone v. Bombardier-Rotax GmbH,* 360 F.Supp.2d 665, 673-74 (E.D.Pa.2005).

Pilatus's direct connections to Pennsylvania are limited to minimal purchases from suppliers in the state (less than 1% of Pilatus's total purchases annually) and a trip to investigate whether a Pennsylvania company would be able to supply Pilatus with displays. Def.'s Br. Senior Aff. ¶ 17. In *Helicopteros,* the United States Supreme Court held that a defendant's major purchases (almost 80% of its total purchases) and regular employee visits to the forum were insufficient to establish general jurisdiction. *Helictoperos,* 408 U.S. at 411, 418. Pilatus's contacts with Pennsylvania are minimal compared to those in *Helicopteros.* Neither Pilatus nor its United States subsidiary, PilBAL, come close to having "systematic and continuous" contacts with Pennsylvania, and the Court will not exercise general jurisdiction over Pilatus.

III. *Pilatus's Motion to Dismiss Cross-Claims*

***10** Defendants Rosemount Aerospace and Goodrich Corporation cross-claimed against Pilatus under Fed.R.Civ.P. 13. Defs. Rosemount and Goodrich Corp. Answer to Cons.Compl. at 26-27. Pilatus moved to dismiss the cross-claims for lack of personal jurisdiction. In their response, Rosemount and Goodrich Corporation said that they had cross-claimed based on contribution or indemnity, and that if the Court found that it did not have personal jurisdiction over Pilatus and dismissed Pilatus from the case, then they would pursue any claim for

contribution or indemnity in the appropriate forum. At oral argument, the parties agreed that the cross-claims were dependent on the outcome of Pilatus's primary motion to dismiss. Oral Arg. Tr. at 52, Mar. 6, 2008.

The Court has found that it does not have personal jurisdiction over Pilatus and will dismiss the Rosemount and Goodrich Corporation cross-claims.

IV. *The Plaintiffs' Motion to Transfer*

Two weeks after the Court heard oral argument on Pilatus's motion to dismiss, the plaintiffs moved to transfer the case to federal district court in Colorado under 28 U.S.C. § 1631, in the event that the Court determined that it lacked personal jurisdiction over Pilatus.[FN7] Pls.' Mot. to Transfer Br. at 2. The Court has found that it does not have personal jurisdiction over Pilatus, and so considers the motion to transfer. The Court will deny the motion.

> FN7. In its opposition to Pilatus's motion to dismiss, the plaintiff included a footnote that said: "This action cannot be maintained in Colorado because the Colorado Long-Arm Statute does not confer jurisdiction over this action, where the aircraft was purchased in Massachusetts, kept in Rhode Island, and crashed in Pennsylvania." Pls.' Opp. at 3 n. 2.

Section 1631 provides for transfer when the original court does not have jurisdiction. When "a court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action ... to any other such court in which the action ... could have been brought at the time it was filed." 28 U.S.C.

§ 1631. Section 1631 was intended to address situations where subject matter jurisdiction was lacking, but courts in the Third Circuit have allowed for transfer due to lack of personal jurisdiction. *See Jaffe v. Julien,* 754 F.Supp. 49, 53 (E.D.Pa.1991); *Starline Optical Corp. v. Caldwell,* 598 F.Supp. 1023, 1028 (D.N.J.1984). A court need not have personal jurisdiction over the defendants in order to transfer the case. The burden is on the moving party to show that the transferee court has personal jurisdiction over all of the defendants. *Selas Fluid Processing Corp. v. Spilman,* No. 04-591, 2006 WL 890818, at *4-5 (E.D.Pa. Apr. 3, 2006).

The proposed transferee court must have subject matter jurisdiction, proper venue, and personal jurisdiction over the defendants. *See, e.g., Grimsley v. United Eng'rs & Constructors, Inc.,* 818 F.Supp. 147, 148-49 (D.S.C.1993); 17 James Wm. Moore et al., Moore's Federal Practice § 111.53 (3d ed.2000) (noting that section 1631 has been interpreted in a similar fashion to the other transfer statutes, 28 U.S.C. §§ 1404 and 1406). In order to prevail on their motion to transfer, the plaintiffs must establish that the District of Colorado would have general jurisdiction over all of the defendants.[FN8] There is no specific jurisdiction in Colorado because the claim does not arise from the defendants' contacts with Colorado, and the plaintiffs do not claim that the Colorado court has specific jurisdiction.

> FN8. A plaintiff must be able to establish that personal jurisdiction exists over each defendant in the transferee district. *Guillory v. Barrieau Moving,* No. 03-1105, 2004 WL 1393618, at *2 (D.Conn. June 21, 2004); 15 Charles Alan Wright & Arthur R. Miller,

Federal Practice and Procedure § 3845 & n. 21 (3d ed.2007). The plaintiffs do not mention the other defendants in their motion to transfer. The Court need not address the issue of personal jurisdiction over the other defendants because it finds that the plaintiffs have not met their burden of showing that the District of Colorado has jurisdiction over Pilatus.

*11 The plaintiffs claim that Colorado has general jurisdiction over Pilatus by virtue of its contact with Colorado both directly and through its subsidiary, PilBAL. The plaintiffs also claim that general jurisdiction exists because PilBAL is the alter ego of Pilatus. To support these contentions, the plaintiffs cite many of the same facts discussed above: PilBAL is a wholly owned subsidiary of Pilatus; PilBAL is responsible for the sales of new PC-12 aircraft in the western Hemisphere; PilBAL is located in Broomfield, Colorado; Oscar Schwenk is the Chairman of the Board of Directors for both Pilatus and PilBAL; PC-12 aircraft are the most popular Pilatus planes; and PilBAL generates a significant proportion of Pilatus's revenue through sales in the United States. Pls.' Mot. to Transfer Br. at 4-5.

It is undisputed that PilBAL is a wholly owned subsidiary of Pilatus and that it is located in Colorado. PilBAL, however, is not a defendant in this case. Pilatus's own connections to Colorado are insufficient to meet the high standard of continuous and systematic contacts required for general jurisdiction. The United States Court of Appeals for the Tenth Circuit has laid out factors to be considered in the analysis, including whether the defendant does the following in Colorado: engages in business; is licensed to do business; owns, leases, or

controls assets; maintains employees, offices, phone listings, or bank accounts; has shareholders; advertises or solicits business; pays taxes; visits potential customers; recruits employees; and generates a substantial percentage of its national sales through revenue generated from in-state customers. *Soma Med. Int'l v. Standard Chartered Bank,* 196 F.3d 1292, 1295-96 (10th Cir.1999).

Pilatus's only presence in Colorado is through its sale of PC-12 aircraft and spare parts to PilBAL. Pilatus is not licensed to do business in Colorado, does not maintain employees there or pay taxes there, does not advertise or recruit employees there, and does not generate substantial revenue from sales to in-state customers. Selling to a Colorado customer is not enough, by itself, to establish continuous and systematic contacts sufficient for general jurisdiction. *See Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 415-18, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (finding no general jurisdiction in Texas over a foreign corporation that purchased more than 80% of its fleet from a Texas company over the course of seven years); *Highline Capital Corp. v. Ahdoot,* No. 06-2023, 2008 WL 486020, at *8 (D.Colo. Feb.20, 2008) (holding that 60 business transactions over three years was insufficient to establish general jurisdiction and analogizing those business transactions to the purchases in *Helicopteros*).

The Court now turns to the question of whether Colorado can assert general jurisdiction over Pilatus through its subsidiary, PilBAL.[FN9] A parent company has a separate corporate existence and is treated separately from its subsidiary in the absence of circumstances justifying the disregard of the

corporate entity. *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1364-65 (10th Cir.1974). The mere presence of a wholly owned subsidiary in Colorado does not subject the absent parent corporation to jurisdiction when the two companies are operated as distinct entities. *SGI Air Holdings II LLC v. Novartis Int'l, AG*, 192 F.Supp.2d 1195, 1200 (D.Colo.2002) (citing *Bolger v. Dail-A-Style Leasing Corp.*, 159 Colo. 44, 409 P.2d 517, 519 (Colo.1996)). The presumption of corporate separateness can be overcome only by clear evidence that the parent controls the subsidiary. *FDIC v. First Interstate Bank of Denver, N.A.*, 937 F.Supp. 1461, 1466-67 (D.Colo.1996) (citing *United Elec. Radio & Mach. Workers of Am. v. 163 Pleasant Street, Corp.*, 960 F.2d 1080, 1091 (1st Cir.1992)).

> FN9. The plaintiffs cite *Simeone v. Bombardier-Rotax GMBH*, 360 F.Supp.2d 665 (E.D.Pa.2005) for their alter ego analysis. In the motion to transfer the burden is on the plaintiffs to establish personal jurisdiction over the defendants in Colorado, not Pennsylvania, and the Court looks to Colorado law to determine whether PilBAL is an alter ego of Pilatus.

*12 In Colorado, these factors govern whether a subsidiary is an instrumentality of its parent: (1) the parent corporation owns all or majority of the capital stock of the subsidiary; (2) the parent and subsidiary corporations have common directors or officers; (3) the parent corporation finances the subsidiary; (4) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (5) the subsidiary has grossly inadequate capital; (6) the parent corporation pays

the salaries or expenses or losses of the subsidiary; (7) the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (8) in the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division; (9) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation; and (10) the formal legal requirements of the subsidiary as a separate and independent corporation are not observed. *Boughton v. Cotter Corp.*, 65 F.3d 823, 836 (10th Cir.1995) (quoting *Fish v. East*, 114 F.2d 177, 191 (10th Cir.1940)).

PilBAL is, as discussed above, a wholly owned subsidiary of Pilatus and is the exclusive United States distributor for Pilatus aircraft. Pilatus and PilBAL have the same Chairman of the Board of Directors, and the former CEO of PilBAL later became the CEO of Pilatus. The plaintiffs also claim that Pilatus and PilBAL have the same logo. Pls.' Br. at 8; Def.'s Opp. at 13 n. 4. This is not enough to establish that PilBAL is the alter ego of Pilatus. There is no allegation that PilBAL is undercapitalized or that most of its business is with Pilatus, or that Pilatus finances PilBAL and pays its expenses, or that PilBAL's directors act on direction from Pilatus. The overlap of one common officer and the fact that a parent owns all the stock in a subsidiary does not mean that the subsidiary is the alter ego of the parent. *Benton v. Cameco Corp.*, 375 F.3d 1070, 1081 (10th Cir.2004) (finding that a common officer between a parent and its subsidiary was insufficient to overcome the presumption that the two corporations had separate corporate

identities); *SGI Air Holdings II LLC v. Novartis Int'l, AG*, 192 F.Supp.2d 1195, 1200 (D.Colo.2002).

Pilatus, on its own, does not have the systematic and continuous contacts with Colorado that would subject it to general jurisdiction there. The plaintiffs have not provided clear evidence that PilBAL is Pilatus's alter ego. Therefore, the plaintiffs have not shown that Colorado can exercise jurisdiction over Pilatus and have not met their burden under section 1631. The Court will deny the motion to transfer.

An appropriate Order follows.

ORDER

AND NOW, this **30th** day of April, 2008, upon consideration of defendant Pilatus's motion to dismiss for lack of personal jurisdiction, or alternatively, motion to dismiss for failure to state a claim, motion for a more definite statement, and motion to strike (Docket No. 36); Pilatus's motion to dismiss defendants Rosemount and Goodrich Corporation's cross-claims for lack of personal jurisdiction (Docket No. 41); and the plaintiffs' motion to transfer to the District of Colorado (Docket No. 58); IT IS HEREBY ORDERED that:

*13 1. Defendant Pilatus's motion to dismiss for lack of personal jurisdiction is hereby GRANTED;

2. Defendant Pilatus's alternative motion to dismiss for failure to state a claim, motion for a more definite statement, and motion to strike are hereby DENIED as moot;

3. Defendant Pilatus's motion to dismiss the

Rosemount and Goodrich Corporation cross-claims is hereby GRANTED;

4. Plaintiffs' motion to transfer to the District of Colorado is hereby DENIED.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (MAY 14, 2009)

United States Court of Appeals,
Third Circuit.

Theresa D'JAMOOS, As Executrix of the ESTATE OF Dawn Elizabeth WEINGEROFF; Frederick L. Weingeroff, Administrator of the Estate of Leland C. Weingeroff & Executor of the Estate of Gregg C. Weingeroff; Stanley J. Wachtenheim, Executor of the Estate of Jeffrey M. Jacober; Michael A. Jacober; David S. Jacober, Co-Executors of the Estate of Karen L. Jacober & Co-Administrators of the Estate of Eric B. Jacober

v.

PILATUS AIRCRAFT LTD.; Pilatus Flugzeugweke Aktiengesellschaft; Rosemount Aerospace, Inc.; Revue Thommen AC; EMCA; Goodrich Avionics Systems, Inc.; L-3 Communications Corporation; Goodrich Corporation
Theresa D'Jamoos; Frederick L. Weingeroff; Stanley J. Wachtenheim; Michael A. Jacober; David S. Jacober, Appellants.

No. 08-2690.

Argued March 5, 2009.
Filed: May 14, 2009.
As Amended June 24, 2009.

Anthony Tarricone, Joseph P. Musacchio, Kreindler & Kreindler LLP, Boston, MA, Center for Constitutional Litigation, P.C., Washington, DC, Sol H. Weiss, Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, PC, Philadelphia, PA, for Plaintiffs-Appellants.

Bruce J. Berman, (argued), McDermott Will & Emery LLP, Miami, FL, Jeffrey Baltruzak, Jeffrey A. Rossman, McDermott Will & Emery LLP, Chicago, IL, J. Bruce McKissock, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA, for Defendant-Appellee Pilatus Aircraft Ltd.

Before: BARRY and GREENBERG, Circuit Judges, and ACKERMAN, District Judge.[FN*]

FN* The Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation. Valerie M. Nannery John Vail (argued).

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter comes on before this Court on an appeal from an order of the United States District Court for the Eastern District of Pennsylvania, entered on April 30, 2008, and made final by an order entered on May 27, 2008: (1) granting a motion by appellee Pilatus Aircraft Ltd. ("Pilatus") [FN1] to dismiss it as a defendant for lack of personal jurisdiction, and (2) denying appellants' motion to transfer the action to

the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1631. *D'Jamoos v. Pilatus Aircraft Ltd.*, No. 07-1153, 2008 U.S. Dist. LEXIS 35181, 2008 WL 1902193 (E.D.Pa. Apr. 30, 2008). For the reasons that follow, we will affirm the order of the District Court to the extent that it held that it did not have jurisdiction over Pilatus, but will vacate the order of the District Court to the extent that it denied the motion to transfer the action to Colorado and will remand the case to the District Court for further proceedings.

> FN1. Pilatus is a single entity which appellants sued in the District Court under both its English and German names (Pilatus Aircraft, Ltd. and Pilatus Flugzeugweke Aktiengesellschaft).

II. FACTS AND PROCEDURAL HISTORY

This action arose from tragic events on March 26, 2005, when a PC-12 turboprop aircraft that Pilatus had manufactured *98 crashed while attempting to land in State College, Pennsylvania. The plane, piloted by Jeffrey Jacober, was carrying five passengers, and all six people on the plane were killed. At the time of the crash, the plane had been making a planned stop in Pennsylvania on its way from Florida to Rhode Island, where the six persons lived. This action, among others, followed.[FN2] The plaintiffs, now the appellants, are Rhode Island citizens and are the representatives of the decedents' Rhode Island estates.

> FN2. The six plaintiffs each filed a separate action against the same defendants, but the District Court consolidated the cases. As a

matter of convenience, we refer to the actions as a single case.

A. The Manufacture and Distribution of PC-12s

Pilatus is a Swiss company based in Stans, Switzerland, where it has designed and manufactured single-engine aircraft since 1939. Pilatus makes planes for both the general aviation and military training aircraft markets. The PC-12 is a single-engine turboprop aircraft designed for the civilian, general aviation market.

The majority of Pilatus's PC-12s ultimately are sold in the United States. In fact, Pilatus's Annual Report 2006 ("Annual Report") describes the United States as "unrivalled" among purchasers of PC-12s, having taken delivery of nearly two-thirds of the 670 PC-12s that Pilatus had built to date. App. at 103. Pilatus makes all sales of the PC-12 in the United States through its Colorado-based United States subsidiary, Pilatus Business Aircraft, Ltd. ("PilBAL"), which is responsible for all PC-12 sales in North and South America. PilBAL buys the planes from Pilatus, then sells them to contracted independent dealers, which, in turn, market and sell the PC-12s to retail customers in their respective geographic areas. Pilatus is not involved directly in the United States in the sale of its planes, as PilBAL and its independent dealers are responsible for the advertising and marketing of the PC-12s in this country. Moreover, Pilatus does not perform any maintenance in the United States on the planes it has manufactured. Pilatus asserts that it generally is not aware of when and where new PC-12s are sold to retail buyers after PilBAL purchases the planes, and that it generally is not aware of any subsequent

resales of its planes.[FN3] Similarly, PilBAL claims that it generally is not aware of when and where the independent dealers ultimately sell the planes in their multi-state territories.

> FN3. Pilatus's own statements, however, belie its attempts to appear entirely disconnected from end-customers. In its Annual Report, Pilatus writes:
>
> > Pilatus Aircraft in Stans is also a home base ... for all our PC-12 customers worldwide. Because they know that whatever happens, they can expect support from Stans around the clock. This always has been and will continue to be our philosophy.
>
> App. at 92. Confirming that it does not sever all ties to its planes when they leave the factory, Pilatus also states on its website that "[o]ur customer support is among the best in aviation and we are proud to offer this service around the globe over the lifecycle of a product." *Id.* at 80.

To obtain Federal Aviation Administration ("FAA") certification allowing PC-12 planes to be registered and flown in the United States, Pilatus equips its PC-12s with a stick-pusher system intended to prevent the planes from stalling and entering a spin, which would create a significant risk of crashing. The turboprop aircraft at issue in this case, Pilatus PC-12 S/N 299, included such a system. Appellants allege that the subject aircraft crashed because of the failure of its stick-pusher system and/or other components, as well ***99** as systems manufactured by other defendants not involved in this appeal.

In 1999, Pilatus manufactured the aircraft involved in the Pennsylvania crash at its Stans, Switzerland, facilities. Thereafter Pilatus sold the aircraft to a French buyer. Its owner then resold the plane to a Swiss company (not Pilatus), which resold it to a Massachusetts company. The Massachusetts company brought the plane to the United States in the spring of 2003 and sold it to J2W Aviation, LLC, a Rhode Island company which based the aircraft in Rhode Island. Pilatus was not involved in any of the aircraft's resales, and its only contact with the plane after its original sale was some maintenance of it in Switzerland at the request of its then owners. Pilatus, however, had no contact with the aircraft after it left Europe.

B. Contacts with Pennsylvania

Pilatus contends that appellants cannot sue it in Pennsylvania because Pilatus has had almost no contacts within Pennsylvania. In this regard, it is undisputed that Pilatus never has had offices, mailing addresses, telephone numbers, facilities, employees, officers, directors, owners, shareholders, agents, assets, investments, bank accounts, or subsidiaries in Pennsylvania; Pilatus never has owned, leased, or used real property in Pennsylvania; and Pilatus never has registered to do business in Pennsylvania. In the last five years, Pilatus has not sold any aircraft to purchasers in Pennsylvania or shipped anything directly to persons or entities in Pennsylvania.[FN4] Pilatus has not advertised or marketed its products in Pennsylvania and did not design the PC-12 for the Pennsylvania market specifically, although it did target the United States market generally by designing the plane to

ensure its compliance with FAA requirements. Within the five years preceding this litigation, however, Pilatus did have some direct contacts within Pennsylvania. In the early 2000s, Pilatus sent two employees to view displays at a potential supplier in Pennsylvania that Pilatus never used. Moreover, Pilatus purchased $1,030,139 in products, equipment, or services [FN5] from suppliers in Pennsylvania, an amount that represented less than one percent of Pilatus's total annual purchases for an approximately five-year period.

> FN4. We are not implying that before the five-year period it made such sales or shipments. We also note that the five-year period as such has no particular significance, but we refer to that period throughout our discussion of Pilatus's contacts within Pennsylvania because it is the time frame that Pilatus used in the affirmations it filed with its motion to dismiss.
>
> FN5. The record does not specify what products, equipment, or services Pilatus purchased from Pennsylvania suppliers.

PilBAL also had some contacts within Pennsylvania during this time. From 2003 to 2007, PilBAL sold $600,000 worth of spare airplane parts to its independent dealer serving Pennsylvania, a Maryland company called SkyTech, Inc. At SkyTech's request, PilBAL shipped parts directly to Pennsylvania customers. In 2005, PilBAL paid $12,705.80 to place an advertisement in five or six [FN6] issues of *Police and Security News,* a national publication with offices in Quakertown, Pennsylvania.

> FN6. An affirmation of Martha Geisshuesler, an officer of PilBAL, in the record is unclear with respect to how many times the advertisement ran. It notes that "[t]he advertisement ran in five issues," but that "PilBAL paid $12,705.80 for the six spots." App. at 173. The difference is of no significance on this appeal.

The record does not contain any evidence of sales of PC-12s in Pennsylvania *100 by Pilatus, PilBAL, or SkyTech. Nevertheless, an owner-operator list that Pilatus maintains for warranty purposes shows that some of its planes have ended up in Pennsylvania and some may have been resold there. At the time of Pilatus's motion to dismiss, four PC-12s and four other Pilatus planes were based in Pennsylvania,[FN7] but the record does not show how the four PC-12s reached Pennsylvania.

> FN7. There is some confusion in the record as to whether four or seven PC-12s are registered in Pennsylvania, but the parties seem to believe that seven is the correct number. The outcome of this appeal does not depend on four or seven being the correct number.

C. Contacts with Colorado

Although Pilatus itself [FN8] is not registered to do business in Colorado, it conducts nearly $200 million [FN9] in annual business there in transactions with PilBAL, its wholly-owned, Colorado-based subsidiary, which it founded specifically to provide "completions, marketing, sales, and service for Pilatus aircraft in North and South America." App.

at 83. Pilatus's relationship with Colorado is highly profitable, and in 2005 and 2006, approximately half of Pilatus's revenue originated with PilBAL. According to Pilatus's Annual Report, PilBAL, "[a]s in past years ... made the biggest contribution to the total annual sales figures" of the company, selling 61 PC-12s, or over two-thirds of the 90 such aircraft sold in 2006, while at the same time receiving a record number of orders for new aircraft as well. *Id.* at 105. Of the 61 aircraft PilBAL sold, 54 were sold in the United States. The report indicates that more than 430 of the 600-plus PC-12s in operation worldwide had been completed [FN10] and delivered in the United States, and that PilBAL's gross sales had amounted to 53.1% of Pilatus's overall gross sales in 2005 and 43% in 2006.

> FN8. Because appellants have not pleaded sufficient facts to support a finding to the contrary, we treat Pilatus and PilBAL as distinct corporate entities.
>
> FN9. According to Pilatus's Annual Report, PilBAL grossed just over 245 million Swiss francs in each of 2005 and 2006, which converted to nearly $200 million per year based on the conversion rates listed in the report for those years.
>
> FN10. The record does not describe the services PilBAL performed in the "completion" of PC-12s in Colorado.

D. The District Court's Decision

Appellants brought this action on March 22, 2007, when they sued Pilatus and several manufacturers of

the aircraft's component parts in the United States District Court for the Eastern District of Pennsylvania, asserting against each defendant claims predicated on products liability, negligence, and breach of warranty. On December 7, 2007, Pilatus moved to dismiss the complaint for lack of personal jurisdiction under Fed.R.Civ.P. 12(b)(2), among other grounds, and filed supporting affirmations. Appellants did not request jurisdictional discovery to oppose the motion, but, instead, relied on publicly available information for that purpose. Consequently, the jurisdictional facts the parties submitted on the motion essentially are undisputed.

Nearly two weeks after oral argument on the motion to dismiss in the District Court, appellants filed an action in the United States District Court for the District of New Hampshire against Pilatus asserting the same claims that it has made in this case.[FN11] In New Hampshire, however, appellants requested to have the opportunity*101 to pursue jurisdictional discovery, and the court has granted that request. *See D'Jamoos v. Pilatus Aircraft, Ltd.*, No. 08-108, 2008 U.S. Dist. LEXIS 96562, 2008 WL 5083798 (D.N.H. Nov. 25, 2008). One day after its New Hampshire filing, appellants moved in the Pennsylvania District Court to transfer this action to Colorado pursuant to 28 U.S.C. § 1631.

> FN11. Appellants also sued the plane's aircraft maintenance company in New Hampshire, but we are not concerned with the theory of the claim against it.

On April 30, 2008, the District Court granted Pilatus's motion to dismiss and denied appellants'

motion to transfer the action to Colorado. Based on the undisputed factual record, the Court found that Pennsylvania lacked specific jurisdiction over Pilatus in this action. *D'Jamoos,* 2008 U.S. Dist. LEXIS 35181 at *10-21, 2008 WL 1902193 at *3-7. Noting that the aircraft had entered Pennsylvania via a series of third-party resales unconnected to Pilatus, the Court found that Pilatus lacked the requisite minimum contacts within Pennsylvania to support the exercise of specific jurisdiction. The Court concluded that Pilatus had not purposefully availed itself of the privilege of conducting business within Pennsylvania, and that "[t]his single, isolated incident involving a product that Pilatus sold in Europe is not enough to support jurisdiction in Pennsylvania." *Id.* at *15-16, 2008 WL 1902193 at *5. The Court also found that the factual record did not support personal jurisdiction over Pilatus under any of the Supreme Court's stream-of-commerce tests, and that, in any event, a stream-of-commerce analysis was "not entirely apposite in this case, because the subject aircraft did not enter Pennsylvania through any stream of commerce." *Id.* at * 19, 2008 WL 1902193 at *6.

The District Court also concluded that neither Pilatus nor PilBAL had the "continuous and systematic" contacts necessary to subject Pilatus to general jurisdiction in Pennsylvania. *Id.* at *22, 2008 WL 1902193 at *7. Finally the Court denied the motion to transfer, concluding that appellants failed to show that Colorado had general jurisdiction over Pilatus, much less the other remaining defendants. *Id.* at *27-37, 2008 WL 1902193 at *9-12.

Although the dismissal of Pilatus from the action did not complete the litigation, as it still was pending

against the other defendants, the District Court subsequently entered final judgment in its favor pursuant to Fed.R.Civ.P. 54(b). Appellants then timely appealed from that judgment to this Court. The District Court has stayed the case pending disposition of this appeal.

III. JURISDICTION AND STANDARD OF REVIEW

The District Court's subject-matter jurisdiction rested on diversity of citizenship between appellants and each of the eight defendants, including Pilatus, pursuant to 28 U.S.C. § 1332(a)(2). We have appellate jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's determination that Pennsylvania lacked personal jurisdiction over Pilatus. *See O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 316 (3d Cir.2007). Similarly, because the Court based its denial of the transfer motion solely on its conclusion of law that Colorado courts would lack personal jurisdiction over Pilatus, we also review that determination de novo.

IV. DISCUSSION

Appellants challenge the District Court's decision: (1) granting Pilatus's motion to dismiss for lack of personal jurisdiction, and (2) denying appellants' motion to transfer the action to Colorado pursuant to 28 U.S.C. § 1631. We will deal with each issue in turn.

***102** A. Specific Jurisdiction Over Pilatus in Pennsylvania

[1] Once a defendant challenges a court's exercise of personal jurisdiction over it, the plaintiff bears the

burden of establishing personal jurisdiction. *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 150 (3d Cir.2001). However, inasmuch as the District Court in this case did "not hold an evidentiary hearing ..., the plaintiff[s] needed only [to] establish a prima facie case of personal jurisdiction and the plaintiff[s were] entitled to have [their] allegations taken as true and all factual disputes drawn in [their] favor." *Miller Yacht Sales, Inc. v. Smith*, 384 F 3d 93, 97 (3d Cir.2004).

[2] "A federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state." *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436 (3d Cir.1987). Because this case comes on before this Court on an appeal from the United States District Court for the Eastern District of Pennsylvania, we apply the Pennsylvania long-arm statute, which provides for jurisdiction "based on the most minimum contact with th[e] Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons.Stat. Ann. § 5322(b) (West 2004); *see O'Connor*, 496 F.3d at 316. Accordingly, in determining whether there is personal jurisdiction, we ask whether, under the Due Process Clause, Pilatus has "certain minimum contacts with [Pennsylvania] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (internal quotation marks omitted).

[3] There are two types of personal jurisdiction, general jurisdiction and specific jurisdiction, the second of which is concerned solely with the

jurisdiction in the action at bar. *See Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414-15, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). Thus, it is entirely possible that a court might have personal jurisdiction in a particular case over a defendant but not have jurisdiction over it in other cases. Inasmuch as appellants do not contend on this appeal that Pilatus's contacts within Pennsylvania support the exercise of general jurisdiction over it, the issue before us is whether Pilatus is subject to specific jurisdiction in this action in Pennsylvania.[FN12]

> FN12. In the District Court appellants did argue that the Pennsylvania District Court had both specific and general jurisdiction over Pilatus.

[4] In determining whether there is specific jurisdiction, we undertake a three-part inquiry. First, the defendant must have "purposefully directed [its] activities" at the forum. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (internal quotation marks omitted). Second, the litigation must "arise out of or relate to" at least one of those activities. *Helicopteros,* 466 U.S. at 414, 104 S.Ct. at 1872; *O'Connor,* 496 F.3d at 317. And third, if the first two requirements have been met, a court may consider whether the exercise of jurisdiction otherwise "comport[s] with 'fair play and substantial justice.' " *Burger King,* 471 U.S. at 476, 105 S.Ct. at 2184 (quoting *Int'l Shoe,* 326 U.S. at 320, 66 S.Ct. at 160).

[5][6][7] The first two parts of the test determine whether a defendant has the requisite minimum

contacts with the forum.*103 The threshold requirement is that the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). To meet this requirement, the defendant's physical entrance into the forum is not necessary. *See Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184; *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir.1993). A defendant's contacts, however, must amount to "a deliberate targeting of the forum." *O'Connor*, 496 F.3d at 317. The "unilateral activity of those who claim some relationship with a nonresident defendant" is insufficient. *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1239-40.

[8] The record before us conclusively establishes that Pilatus's direct contacts within Pennsylvania are quite limited. Certainly, the aircraft at issue in this case entered Pennsylvania's airspace and crashed there, and all six people on board were killed in Pennsylvania. Yet we cannot link these events to Pilatus's deliberate activities aimed at Pennsylvania. Although Pilatus designed and manufactured the subject aircraft, it did so in Switzerland and then sold the plane in Europe.[FN13] The aircraft later reached the United States via a series of third-party resales in which Pilatus was not involved, only arriving in Pennsylvania because it was making a stopover on an interstate flight. Pilatus did not profit from activities in Pennsylvania as a result of the aircraft's initial sale or resales. And although a small number of Pilatus's PC-12s are based in Pennsylvania, there is no record evidence indicating how those planes reached Pennsylvania. Certainly, we have no basis to believe that Pilatus sent the

planes to Pennsylvania.

> FN13. Though the District Court said that the sale was in Switzerland, we do not know in a strict legal sense whether the sale was in France or Switzerland (or possibly elsewhere), but this point is of no significance on this appeal as the sale surely was not in Pennsylvania or, for that matter, in the United States.

Appellants contend that by designing and manufacturing its planes to meet FAA standards, Pilatus purposefully availed itself of Pennsylvania law inasmuch as FAA standards govern aviation in Pennsylvania. Further, appellants argue that Pilatus benefitted from the fact that the State of Pennsylvania could not exclude the plane from its airspace, a fact on which Pilatus relied and profited when it sold the plane to a French buyer.[FN14] Of course, these arguments could apply to a claim that there would be jurisdiction over Pilatus in any state in the nation; indeed, appellants claim that because Pilatus targets the United States market as a whole, it has a purposeful affiliation with every state and must expect to be sued in any state where one of its aircraft crashes.

> FN14. We do not think that the factual basis for appellants' argument is farfetched; it would be useful for a potential European buyer who intended to use the airplane in Europe, when considering whether to make the purchase, to take into account the places in which there could be a resale market for the plane.

[9] We acknowledge that there is a certain reasonableness to an argument that a manufacturer should be subject to suit in a jurisdiction in which its plane crashes if the suit charges that a manufacturing defect caused the crash. After all, would it be fair in a case in which an uninvolved person on the ground suffered a loss by reason of a plane crash to require that person to bring his or her damage action in some other possibly faraway jurisdiction? Yet it is clear that the critical finding that the defendant purposefully *104 availed itself of the privilege of conducting activities within the forum requires contacts that amount to a deliberate reaching into the forum state to target its citizens. *See Burger King*, 471 U.S. at 475-76, 105 S.Ct. at 2184; *O'Connor*, 496 F.3d at 317-18. Pilatus's efforts to exploit a national market necessarily included Pennsylvania as a target, but those efforts simply do not constitute the type of deliberate contacts within Pennsylvania that could amount to purposeful availment of the privilege of conducting activities in that state. Rather, any connection of Pilatus to Pennsylvania merely was a derivative benefit of its successful attempt to exploit the United States as a national market.

We are aware of appellants' argument that the subject aircraft's value (and thus Pilatus's initial profit) was enhanced by the fact that the aircraft could travel in or be sold in Pennsylvania, but the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), rejected a parallel argument. In *Woodson*, which addressed the New York sale by a New York retailer of an automobile that ultimately caused injury in Oklahoma, the plaintiffs argued "that the purchase of automobiles in New York, from

which the petitioners earn substantial revenue, would not occur *but for* the fact that the automobiles are capable of use in distant States like Oklahoma." *Id.* at 298, 100 S.Ct. at 568. The Court concluded that

> financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of in *personam* jurisdiction over them.

Id. at 299, 100 S.Ct. at 568 (citation omitted). We acknowledge that the PC-12 is a highly mobile product capable of crossing international and state lines and that Pilatus designed it specifically to meet federal requirements that were a prerequisite to its use in all 50 states. Nonetheless, although the circumstance that the State of Pennsylvania cannot exclude Pilatus's planes is beneficial to Pilatus, the State of Pennsylvania does not confer that benefit, and the benefit "do[es] not stem from a constitutionally cognizable contact with that State." *See id.*

Pilatus's direct contacts within Pennsylvania, then, are limited to: (1) sending two employees to Pennsylvania to view displays at a potential supplier, and (2) purchasing $1,030,139 in goods or services from suppliers in Pennsylvania during the five-year period preceding this litigation. But even if these contacts could constitute purposeful availment of the privilege of conducting activities in

Pennsylvania, appellants do not allege that their claims "arise out of or relate to" these direct contacts within Pennsylvania, *see Helicopteros,* 466 U.S. at 414, 104 S.Ct. at 1872, and the record could not support a finding that they did. Therefore, appellants cannot satisfy the second stage of the minimum contacts inquiry, which requires appellants to establish that their claims arise out of or relate to at least one of Pilatus's purposeful contacts with the forum.

[10] As an alternative basis for supporting jurisdiction, appellants contend that Pilatus has minimum contacts within Pennsylvania under a stream-of-commerce theory. Courts have relied on the stream-of-commerce theory to find a basis for personal jurisdiction over a non-resident defendant, often a manufacturer or distributor, which has injected its goods into the forum state indirectly via the so-called ***105** "stream of commerce." FN15 *See Pennzoil Prods. Co. v. Colelli & Assocs.,* 149 F.3d 197, 203 (3d Cir.1998); *Max Daetwyler Corp. v. R. Meyer,* 762 F.2d 290, 298-300 (3d Cir.1985).

> FN15. In *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the Supreme Court sought to clarify the elements of jurisdiction under the stream-of-commerce theory. A majority of the Court, however, could not agree on the contours of what constitutes "purposeful availment" in the stream-of-commerce context, and thus its fragmentation did not allow the adoption of bright-line rules. The two plurality opinions in *Asahi,* Justice O'Connor's and Justice Brennan's, produced two distinct frameworks for the minimum contacts

> analysis as it relates to stream-of-commerce theory, and we have not had occasion to choose between the O'Connor and Brennan positions. *See Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 207 n. 13 (3d Cir.1998) (concluding that "[s]ince the facts of this case satisfy the standards of both *Asahi Metal* pluralities, we do not have occasion to select one standard or the other as the law of this circuit"); *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 283-84 (3d Cir.1994) (remanding for further discovery without reaching the issue of which *Asahi* standard should control). Once again, we need not decide this issue; as we will discuss, a stream-of-commerce analysis is inapposite on the facts presented here.

Appellants contend that Pilatus injected its planes into the stream of commerce expecting that they would reach the United States. By adding to that contention the highly mobile nature of the PC-12, which is designed for interstate travel and which Pilatus promotes as an " 'SUV' of the skies," App. at 94, appellants argue it was wholly foreseeable to Pilatus that one of its planes ultimately could cause injury in Pennsylvania. But even if we accept these contentions, the stream-of-commerce theory does not provide a basis for jurisdiction in this case.

[11] As an initial matter, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Woodson*, 444 U.S. at 295, 100 S.Ct. at 566. Instead, the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the

forum State are such that he should reasonably anticipate being haled into court there. *Id.* at 297, 100 S.Ct. at 567. As we noted above, Pilatus's "conduct and connection with" Pennsylvania fail to meet this standard. *See id.* Moreover, the Supreme Court in *Woodson* squarely dismissed the contention appellants make in this case that the foreseeability analysis necessarily is influenced by the highly mobile nature of the product at issue. *Id.* at 296 n. 11, 100 S.Ct. at 567 n. 11 ("[W]e see no difference for jurisdictional purposes between an automobile and any other chattel.").

In any event, it is absolutely fatal to appellants' stream-of-commerce argument that the subject aircraft did not actually enter Pennsylvania through a "stream of commerce" as that term is generally understood-i.e., "the regular and anticipated flow of products from manufacture to distribution to retail sale." *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117, 107 S.Ct. 1026, 1034, 94 L.Ed.2d 92 (1987) (Brennan, J., concurring). Any "stream" of planes from Pilatus to Pennsylvania would begin with Pilatus's manufacture of them and be followed by Pilatus's sale to them to PilBAL. Then PilBAL would distribute the planes to SkyTech, and finally SkyTech would sell the planes to buyers in Pennsylvania. It is by this path-from the Swiss manufacturing facility to PiBAL to regional dealer to end purchaser-that Pilatus targets the American market and intends and expects its aircraft to reach customers in the United***106** States, including, arguably, those in Pennsylvania.

If the claim in this case had arisen out of these efforts to serve, even indirectly, the Pennsylvania market, then it would make sense to evaluate

Pilatus's conduct under the stream-of-commerce theory. *See Woodson,* 444 U.S. at 297, 100 S.Ct. at 567 (stating that, if the sale of a product "arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others"). It is undisputed, however, that the aircraft involved in this case did not follow the foregoing regular and anticipated path to Pennsylvania. Rather, Pilatus sold the aircraft to a French buyer who resold it to a Swiss company (not Pilatus) that, in turn, resold it to a Massachusetts company that brought it to the United States and sold it to the Rhode Island company, its owner at the time of the accident.

By arguing that a stream-of-commerce analysis could support jurisdiction even when the product at issue did not go through the "stream," appellants essentially ask us to find that the stream-of-commerce theory provides an independent source of personal jurisdiction over Pilatus, a source unrelated to appellants' claims. However, the fact that *other* Pilatus planes have followed a certain path to Pennsylvania and other states cannot provide the necessary connection between Pilatus and Pennsylvania to support specific jurisdiction in this case, because the aircraft involved here reached Pennsylvania by a series of fortuitous circumstances independent of any distribution channel Pilatus employed. If we held otherwise, we impermissibly would remove the "arising from or related to" requirement from the specific jurisdiction test and unjustifiably would treat the stream-of-commerce theory as a source of general jurisdiction. *See Purdue*

Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 788 (7th Cir.2003) (holding that stream-of-commerce theory "is relevant only to the exercise of specific jurisdiction; it provides no basis for exercising general jurisdiction over a nonresident defendant"); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir.1987) ("A conclusion that there is a stream of commerce ensures that the contact that caused harm in the forum occurred there through the defendant's conduct and not the plaintiff's unilateral activities; it does not ensure that defendant's relationship with the forum is continuous and systematic, such that it can be sued there for unrelated claims.").

Because we conclude that appellants fail to establish that Pilatus had the required minimum contacts within Pennsylvania, we do not consider, under the third prong of a specific jurisdiction analysis, whether the exercise of specific jurisdiction over Pilatus "would comport with 'fair play and substantial justice.' " *Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184 (quoting *Int'l Shoe*, 326 U.S. at 320, 66 S.Ct. at 160).

B. General Jurisdiction over Pilatus in Colorado

Appellants also challenge the District Court's denial of its motion to transfer the case to Colorado pursuant to 28 U.S.C. § 1631. Under section 1631, when a district court finds that it is lacking jurisdiction,

> the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the

> action or appeal shall proceed as if it had been filed in or noticed for the court *107 to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631; *see also Island Insteel Sys., Inc. v. Waters,* 296 F.3d 200, 218 & n. 9 (3d Cir.2002) (noting that section 1631 permits transfer for lack of in personam jurisdiction). Inasmuch as the District Court concluded that appellants failed to show that Colorado had personal jurisdiction over Pilatus, much less the other defendants, it believed that it could not transfer the case to Colorado as section 1631 permits a transfer of a case only to a court in which the case originally could have been brought. In concluding that Colorado did not have personal jurisdiction over Pilatus, the Court rejected Pilatus's ownership of PilBAL, its Colorado-based subsidiary, as a basis for jurisdiction. Because the Court predicated its denial of appellants' motion solely on its conclusion that Colorado lacked personal jurisdiction over Pilatus, that determination is a conclusion of law over which we exercise plenary review.

[12] Inasmuch as district courts may exercise personal jurisdiction over nonresident defendants to the extent authorized under the law of the forum state in which the district court sits, *Provident National Bank,* 819 F.2d at 436, we look to Colorado law to determine whether a Colorado court could exercise jurisdiction over Pilatus. Colorado's long-arm statute, like Pennsylvania's with respect to its courts, extends the jurisdiction of Colorado courts to the maximum limit permitted by the due process clauses of the United States and the state, i.e.,

Colorado, constitutions. *Goettman v. N. Fork Valley Rest. (In re Goettman),* 176 P.3d 60, 67 (Colo.2007). If the exercise of jurisdiction is consistent with due process, Colorado's long-arm statute therefore authorizes a court to exercise jurisdiction over a defendant. *Id.*

[13] Inasmuch as appellants do not contend that the Colorado courts would have specific jurisdiction in this case, but, instead contend that the Colorado courts have general jurisdiction over Pilatus, we turn our focus to that basis for the exercise of personal jurisdiction. General jurisdiction depends on a defendant having maintained "continuous and systematic" contacts with the forum state. *Helicopteros,* 466 U.S. at 415-16, 104 S.Ct. at 1872-73. In determining whether a foreign corporate defendant has the requisite continuous and systematic contacts with the forum, the Court of Appeals for the Tenth Circuit considers: (1) whether the corporation solicits business in the state through a local office or agents; (2) whether the corporation sends agents into the state on a regular basis to solicit business; (3) the extent to which the corporation holds itself out as doing business in the forum state through advertisements, listings or bank accounts; and (4) the volume of business conducted in the state by the corporation. *See Doering v. Copper Mountain, Inc.*, 259 F.3d 1202, 1210 (10th Cir.2001); *Kuenzle v. HTM Sport-Und Freizeitgerate AG,* 102 F.3d 453, 457 (10th Cir.1996).

[14] We are satisfied that the record demonstrates that appellants have established a prima facie basis for a conclusion that a Colorado court may exercise general jurisdiction over Pilatus predicated on its direct contacts within Colorado or, alternatively, on

the conduct of PilBAL as its agent.

The record supports a finding that Pilatus maintains substantial direct contacts with Colorado through the nearly $200 million in annual business it conducts with PilBAL, its wholly-owned subsidiary based in Broomfield, Colorado, though we recognize that volume of business alone is not *108 dispositive of the jurisdictional question. *See Helicopteros,* 466 U.S. at 418, 104 S.Ct. at 1874 (holding that mere purchases from suppliers in the forum state and incidental related contacts were not sufficiently substantial to support the exercise of general jurisdiction). Contrary to the findings of the District Court, however, it is clear that PilBAL is far more to Pilatus than just a good customer. As Pilatus's only United States subsidiary, PilBAL's *raison d'être* is "to provide completions, marketing, sales, and service for Pilatus aircraft in North and South America." App. at 83. PilBAL is responsible for marketing and sales of only one of Pilatus's products, the PC-12. The PC-12s that PilBAL buys from Pilatus are sent from Switzerland to PilBAL's facilities in Colorado, where PilBAL actually "completes" the aircraft before selling them to its network of independent dealers throughout North and South America. In the normal course of business, therefore, Pilatus sells and transports or has transported to Colorado every PC-12 aircraft destined for an end-customer in the Americas. Moreover, Pilatus's Annual Report emphasizes that "[n]or were [PilBAL's] activities in the 2006 business year merely restricted to selling." *Id.* at 105. Rather, "[t]he company worked intensively on technical innovations and new developments," launching updated features for the PC-12 that included the option of a new type of door, more advanced

monitoring equipment, and an enhanced vision system. *Id.*

Pilatus's Colorado relationship is financially very significant; in 2005 and 2006, approximately half of Pilatus's revenue originated with PilBAL. Pilatus's Annual Report stated that PilBAL "[a]s in past years ... made the biggest contribution to the total annual sales figures: 61 PC-12s in 2006, or just over two-thirds of the 90 aircraft sold [worldwide]." *Id.* The Annual Report indicated:

> The ten-year anniversary of [PilBAL], celebrated in Broomfield on 5 May 2006, was also a special occasion. The following statistic exemplifies this subsidiary's performance: more than 430 of the over 600 PC-12s in operation worldwide to this date were completed and delivered in the United States.

Id. In aggregate, these factors support a finding that the manner in which Pilatus transacts a substantial portion of its annual business within Colorado is both systematic and continuous. Therefore, appellants have made a prima facie showing that, given Pilatus's direct contacts within Colorado, the exercise of general jurisdiction over Pilatus in Colorado would comport with due process.

[15][16] Alternatively, in analyzing the relationship between Pilatus and PilBAL according to principles of agency, we recognize that for a plaintiff to defeat a motion to dismiss for lack of personal jurisdiction when the plaintiff relies on agency theory, it "need only make a prima facie showing of the connection between the actions of the agent and the principal." *In re Goettman,* 176 P.3d at 68. Based on the record before us, we find sufficient information to support a

prima facie showing that the courts in Colorado can exercise general jurisdiction over Pilatus under agency principles.

[17] The concept underlying the agency theory of personal jurisdiction is the familiar principle that a principal is responsible for the actions of its agent. *Id.* at 67. "[A]s all corporations must necessarily act through agents, a wholly owned subsidiary may be an agent and when its activities as an agent are of such a character as to amount to doing business of the parent, the parent is subjected to the in personam jurisdiction of the state in which the activities occurred." *109*Curtis Publishing Co. v. Cassel,* 302 F.2d 132, 137 (10th Cir.1962); *accord First Horizon Merch. Servs. v. Wellspring Capital Mgmt., LLC,* 166 P.3d 166, 177 (Colo.Ct.App.2007).

As we have noted, Pilatus founded PilBAL "to provide completions, marketing, sales, and service for Pilatus aircraft in North and South America." App. at 83. By serving as its United States-based middleman, PilBAL enables Pilatus to reach the large United States market, which its Annual Report makes clear is critical to Pilatus's core business. Pilatus, meanwhile, is not merely a disinterested holding company, with ownership of diversified corporate investments-Pilatus is in the business of manufacturing and selling airplanes. [FN16] *Compare SGI Air Holdings II LLC v. Novartis Int'l AG,* 239 F.Supp.2d 1161, 1169 (D.Colo.2003) (finding agency relationship sufficient to support exercise of personal jurisdiction where subsidiary's business mirrored a "core business" of parent) *with Quarles v. Fuqua Indus., Inc.,* 504 F.2d 1358, 1364 (10th Cir.1974) (finding no jurisdictional predicate where subsidiary, an operator of adult vocational training schools, did

not engage in parent holding company's "business of diversified corporate investments"). These facts support the conclusion that PilBAL exists to conduct Pilatus's business in North and South America. Moreover, as the exclusive Pilatus subsidiary in the Americas-Pilatus's most significant territory by far-PilBAL fairly could be described as the "source of life" to Pilatus's operations. *See Curtis Publishing*, 302 F.2d at 136, 138 (finding that subsidiary was agent of parent for jurisdictional purposes where the subsidiary had exclusive rights to distribute the parent's magazines worldwide; because circulation of its publications was the "source of life" to parent, subsidiary was conducting parent's business); *SGI*, 239 F.Supp.2d at 1169 (where subsidiary's business was "essential" to parent's business, parent had "assumed the risks" of subsidiary's business ventures and, thus, subsidiary was general agent of parent for jurisdictional purposes).

> FN16. Additionally, the same individual serves as Chairman of the Board of Directors for both Pilatus and PilBAL, and the former CEO of PilBAL later became the CEO of Pilatus.

The record makes it clear that the business PilBAL is conducting drives Pilatus's manufacturing activities. In 2006, demand for the PC-12 "far exceeded supply," App. at 105, and sales were limited only by the fact that Pilatus could manufacture but 90 aircraft per year. By the end of the 2006 business year, Pilatus had received 166 orders for new PC-12s, exceeding its production capability for 2007 and meaning that any new customers would "have to wait one-and-a-half years after placing their order before receiving their longed-for PC-12." *Id.* at 103.

Of those orders, 121-over 70 percent-came through PilBAL. Pilatus, therefore, does not manufacture aircraft in the vague hope that someone, somewhere will purchase them; rather, it manufactures aircraft to fill specific, pre-existing orders, most of which originate with PilBAL.[FN17] The fact that Pilatus's PC-12s essentially are made-to-order underscores PilBAL's status as the "source of life" to Pilatus's operations. In sum, we find the record evidence pertaining to agency sufficient to establish prima facie that PilBAL's activities in Colorado amount to doing the business of Pilatus, and that a Colorado court therefore could exercise general jurisdiction over Pilatus.[FN18]

FN17. In fact, the Annual Report even suggests that PC-12s can be ordered with personalized options, including paint in company colors.

FN18. We are aware that the Colorado Supreme Court recently rejected the exercise of general jurisdiction in Colorado, under agency principles, in a case involving a parent-subsidiary relationship similar to that between Pilatus and PilBAL. *See In re Goettman,* 176 P3d at 68. In *Goettman,* the subsidiary was the sole United States purchaser and distributor of its Australian parent's products. However, the subsidiary was not based in Colorado, but was headquartered in Pennsylvania and incorporated in Delaware. The *Goettman* court, moreover, discussed only two contacts within Colorado-(1) the subsidiary's sale and distribution of one product to a Colorado company, and (2) the dispatch of two technical

support people, one from the parent and one from the subsidiary, to Colorado to service that product. *Id.* at 64-65. The parent's contacts within the forum state in *Goettman*, therefore, were less than the equivalent of the direct and substantial contacts we find here, and the case is wholly distinguishable.

C. Requirements for Transfer

[18] We have concluded that the undisputed jurisdictional facts amount to a prima facie showing that Colorado could exercise general jurisdiction over Pilatus. In the present procedural stage, this prima facie showing satisfies section 1631's requirement that the case "could have been brought" in the District of Colorado. While the plaintiff bears the burden of establishing that a court's exercise of personal jurisdiction*110 over a defendant is proper, "[i]n the preliminary stages of the litigation ... that burden is light. Prior to trial, the plaintiff is only required to establish a prima facie showing of jurisdiction." *Doe v. Nat'l Med. Servs.*, 974 F.2d 143, 145 (10th Cir. 1992).

Although we conclude that this action could have been brought against Pilatus in Colorado, our conclusion only partially satisfies the requirements for a transfer under section 1631, for a court can order a transfer only if it is "in the interest of justice to do so," an issue that the District Court should address on the remand that we will direct in this case. In deciding that question, the District Court should consider, on either its own or appellants' motion pursuant to Fed.R.Civ.P. 21, whether the claims as to the non-Pilatus defendants should be severed in order to permit the transfer of the claims

against Pilatus.

[19] The District Court believed that "[a] plaintiff must be able to establish that personal jurisdiction exists over each defendant in the transferee district." 2008 U.S. Dist. LEXIS 31581, at *31 n. 8, 2008 WL 1902193, at *10. This statement truncates the required analysis and suggests that the District Court did not realize that, under our precedent, transfer of the entire action was not its only option. Quite to the contrary, we have interpreted section 1631 to permit the transfer of all or only part of an action. *See Miller v. United States,* 753 F.2d 270, 275-76 (3d Cir.1985) (allowing transfer of part of an appeal to the United States Court of Appeals for the Federal Circuit); *see also United States v. County of Cook,* 170 F.3d 1084, 1087-89 (Fed.Cir.1999) (concluding that transfer of less than an entire action is proper under section 1631). *But see Hill v. United States Air Force,* 795 F.2d 1067, 1070-71 (D.C.Cir.1986) (concluding that section 1631 "directs a court to transfer an 'action' over which it lacks jurisdiction, rather than an individual claim"). Moreover, in applying 28 U.S.C. § 1404(a), which as the District Court acknowledged is comparable to section 1631, we have held that where a case could have been brought against some defendants in the transferee district, the claims against those defendants may be severed and transferred while the claims against the remaining defendants, for whom transfer would not be proper, are retained. *White v. ABCO Eng'g Corp.,* 199 F.3d 140, 144 (3d Cir.1999) ("Nothing within § 1404 prohibits a court from severing claims against some defendants from those against others and transferring the severed claims."). The District Court should have regarded the logic of *Miller* and *White* as controlling here.

We recognize that *Miller* involved a situation in which two different courts of appeals had subject matter jurisdiction over different appeals of a single party's claims. Clearly our reasoning in *White,* however, encompasses the situation here. As in *White,* the course of action we propose to the District Court actually is not a partial transfer at all inasmuch as the action, once severed, may be regarded as two or more separate and independent actions, each of which is then transferrable-or not-pursuant to the terms of section 1631. Thus, it is evident that the District Court may sever the claims against Pilatus and transfer them to Colorado, regardless *111 of its treatment of the claims against the non-Pilatus defendants.[FN19]

> FN19. In so holding, we acknowledge that because appellants did not request a severance, these issues were not framed properly before the District Court. We also recognize that the District Court's discussion on the transfer subject was dicta, because its conclusion that Colorado lacked jurisdiction over Pilatus compelled the denial of the transfer motion as to Pilatus in any event.

Nevertheless, before dividing the case, the District Court should weigh the factors favoring transfer against the potential inefficiency of requiring the similar and overlapping issues to be litigated in two separate forums. *See White,* 199 F.3d at 144-45; *Sunbelt Corp. v. Noble, Denton & Assocs.,* 5 F.3d 28, 33-34 (3d Cir.1993) (stating that a court " 'should not sever if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would require the

same issues to be litigated in two places' ") (quoting *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir.1984)).

In conclusion, we point out that by characterizing our jurisdictional finding as "prima facie," we do not suggest that our decision is tentative or preliminary. Rather, if the District Court determines on remand that a transfer is in the interest of justice and transfers the case to the District of Colorado,[FN20] we believe that the Colorado court will be bound by our prima facie finding of personal jurisdiction insofar as that ruling will be the law of the case. Such a conclusion would be consistent with *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816-17, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988), in which the Supreme Court held that transferee courts should apply the law-of-the-case doctrine to transfer decisions that implicate their jurisdiction, which means that a transferee court will revisit such jurisdictional determinations only in "extraordinary circumstances." *See id.* at 819, 108 S.Ct. at 2179 ("Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end."). We recognize, however, that the question of the propriety of the transfer order would not be removed altogether from the Colorado court, which yet may determine that one of the recognized exceptions to the law-of-the-case doctrine applies to permit reconsideration of our decision. *See Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169-70 (3d Cir.1982) (discussing law-of-the-case doctrine and exceptions); *Africa v. City of Philadelphia* (*In re City of Philadelphia Litig.*), 158 F.3d 711, 717-18 (3d Cir.1998) (same); *In re Antrobus*, 563 F.3d 1092, 1098 & n.2 (10th Cir.2009) (same).

FN20. The District Court may consider factors beyond the jurisdictional point we have noted in making its interest of justice analysis.

V. CONCLUSION

[20] In accordance with our foregoing analysis, we will affirm the District Court's decision that Pennsylvania lacked personal jurisdiction over Pilatus, we will vacate its denial of appellants' motion to transfer the action to Colorado, and we will remand the case to the District Court for further proceedings consistent with this opinion, including a determination as to whether such transfer would be in the interest of justice and whether a severance is in order.

APPENDIX C

AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JUNE 24, 2009)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2690

THERESA D'JAMOOS, As Executrix of the Estate of Dawn Elizabeth Weingeroff; FREDERICK L. WEINGEROFF, Administrator of the Estate of Leland C. Weingeroff & Executor of the Estate of Gregg C. Weingeroff; STANLEY J. WACHTENHEIM, Executor of the Estate of Jeffrey M. Jacober; MICHAEL A. JACOBER; DAVID S. JACOBER, Co-Executors of theEstate of Karen L. Jacober & Co-Administrators of the Estate of Eric B. Jacober

v.

PILATUS AIRCRAFT LTD.; PILATUS FLUGZEUGWEKE AKTIENGESELLSCHAFT; ROSEMOUNT AEROSPACE, INC.; REVUE THOMMEN AC; EMCA; GOODRICH AVIONICS SYSTEMS, INC.; L-3 COMMUNICATIONS CORPORATION; GOODRICH CORPORATION

Theresa D'Jamoos; Frederick L. Weingeroff;Stanley J. Wachtenheim; Michael A. Jacober;David S. Jacober,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-07-cv-01153)
Honorable Mary A. McLaughlin, District Judge

Argued March 5, 2009

ORDER AMENDING OPINION

It is hereby ordered that the opinion of the court in this case filed May 14, 2009, is amended as follows:

(1) On page 32, footnote 18 of the slip opinion (see D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 109 n.18 (3d Cir. 2009)), the last two sentences in the footnote starting as "We recognize that" and ending "general jurisdiction in Colorado" are deleted.

(2) On page 32 of the slip opinion (see D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 109 (3d Cir. 2009)), immediately following "Requirements for Transfer" the following complete paragraph is inserted:

We have concluded that the undisputed jurisdictional facts amount to a prima facie showing that Colorado could exercise general jurisdiction over Pilatus. In the present procedural stage, this prima facie showing satisfies section 1631's requirement that the case "could have been brought" in the District of Colorado. While the plaintiff bears the burden of establishing that a court's exercise of

personal jurisdiction over a defendant is proper, "[i]n the preliminary stages of the litigation . . . that burden is light. Prior to trial, the plaintiff is only required to establish a prima facie showing of jurisdiction." Doe v. Nat'l Med. Servs., 974 F.2d 143, 145 (10th Cir. 1992).

(3) On page 35 of the slip opinion (see D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 111 (3d Cir. 2009)), the last complete paragraph above "V. CONCLUSION" is deleted and the following paragraph is inserted:

In conclusion, we point out that by characterizing our jurisdictional finding as "prima facie," we do not suggest that our decision is tentative or preliminary. Rather, if the District Court determines on remand that a transfer is in the interest of justice and transfers the case to the District of Colorado,[20] we believe that the Colorado court will be bound by our prima facie finding of personal jurisdiction insofar as that ruling will be the law of the case. Such a conclusion would be consistent with Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816-17, 108 S.Ct. 2166, 2178 (1988), in which the Supreme Court held that transferee courts should apply the law-of-the-case doctrine to transfer decisions that implicate their jurisdiction, which means that a transferee court will revisit such jurisdictional determinations only in "extraordinary circumstances." See id. at 819, 108 S.Ct. at 2179 ("Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end."). We recognize, however, that the question of the propriety of the transfer order would not be removed altogether from

the Colorado court, which yet may determine that one of the recognized exceptions to the law-of-the-case doctrine applies to permit reconsideration of our decision. See Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169-70 (3d Cir. 1982) (discussing law-of-the-case doctrine and exceptions); Africa v. City of Philadelphia (In re City of Philadelphia Litig.), 158 F.3d 711, 717-18 (3d Cir. 1998) (same); In re Antrobus, 563 F.3d 1092, 1098 & n.2 (10th Cir. 2009) (same).

By the court,

/s/ Morton I. Greenberg Circuit Judge
DATED: 24 June 2009

*The Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

[20]The District Court may consider factors beyond the jurisdictional point we have noted in making its interest of justice analysis.

APPENDIX D

ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ON REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (OCTOBER 1, 2009)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

THERESA D'JAMOOS, as Executrix,
of the Estate of Dawn
Elizabeth Weingeroff, et al.

CIVIL NO. 07-1153

v. CONSOLIDATED CLAIM

PILATUS AIRCRAFT LTD., et al.

ORDER

AND NOW, this 1st day of October, 2009, upon consideration of the plaintiffs' request that the claims against Pilatus Aircraft, Ltd., be severed and transferred to a Federal District Court in Colorado (Docket No. 77), and for the reasons stated in a memorandum of law bearing today's date, IT IS HEREBY ORDERED that the motion is GRANTED.

The plaintiffs' claims against Pilatus Aircraft, Ltd., are hereby severed and transferred to a Federal District Court in Colorado.

BY THE COURT:

/s/Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

APPENDIX E

MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ON REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (OCTOBER 1, 2009)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

THERESA D'JAMOOS, as Executrix,
of the Estate of Dawn
Elizabeth Weingeroff, et al.

CIVIL NO. 07-1153
v. CONSOLIDATED CLAIM

PILATUS AIRCRAFT LTD., et al.

MEMORANDUM

McLaughlin, J. October 1, 2009

This case was brought by the executors of the estates of five passengers and a pilot killed in a plane crash in Pennsylvania. The plane crashed while making a planned stop in State College, PA, en route from Florida to Rhode Island. One of the defendants is Pilatus Aircraft Ltd. (Pilatus), a Swiss corporation that manufactured and distributed the plane. The plaintiffs asserted claims against Pilatus and several other manufacturer defendants (the non-Pilatus

defendants) for products liability, negligence and breach of warranty.

On April 30, 2008, the Court granted defendant Pilatus's motion to dismiss it as a defendant for lack of personal jurisdiction. See D'Jamoos v. Pilatus Aircraft Ltd., No. 07-1153, 2998 WL 1902193 (E.D.Pa. Apr. 30, 2008). In the same Memorandum and Order, the Court also denied the plaintiffs' request to transfer the action to the United States District Court of Colorado pursuant to 28 U.S.C. § 1631.[1]

On appeal, the United States Court of Appeals for the Third Circuit affirmed the Court's determination that there was no personal jurisdiction over Pilatus in this district. On the issue of transfer, however, the Court of Appeals was "satisfied that the record demonstrates that [the plaintiffs] have established a prima facie basis for a conclusion that a Colorado court may exercise general jurisdiction over Pilatus predicated on its direct contacts within Colorado or, alternatively, on the conduct of [Colorado-based subsidiary, Pilatus Business Aircraft, Ltd. (PilBAL)] as its agent." D'Jamoos v. Pilatus Aircraft, Ltd., 566 F.3d 94, 107 (3d Cir. 2009). The Court of Appeals found that the "undisputed jurisdictional facts amount to a prima facie showing that Colorado could exercise general jurisdiction over Pilatus," which "satisfies section 1631's requirement that the case 'could have been brought' in the District of Colorado." Id. at 109.

[1]Section 1631 provides that "[w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . . ."

Such a conclusion, however, "only partially satisfies the requirements for a transfer under section 1631," and the Court of Appeals then directed the Court to consider on remand whether such a transfer would be "in the interest of justice." Id. at 110. Within that question, the Court is to consider whether the claims against the non-Pilatus defendants should be severed in order to permit the transfer of Pilatus's claims. Id. at 110. On this issue, the Court is instructed to "weigh the factors favoring transfer against the potential inefficiency of requiring the similar and overlapping issues to be litigated in two separate forums." Id. at 111.

The plaintiffs are considering filing for a writ of certiorari to the Supreme Court for review of the Court of Appeals' decision. On July 23, 2009, they filed a motion to extend the time to file such a petition to October 22, 2009. See Pilatus's Opp'n, Exhibit E. That motion was granted on July 31, 2009. The plaintiffs also filed a parallel lawsuit against Pilatus on March 21, 2008, in the District of New Hampshire. Atlas Aircraft Center, Ltd. (Atlas), the aircraft's servicer, is also a defendant in the New Hampshire action. Pilatus has filed a motion to dismiss that action on the ground of lack of personal jurisdiction. Pilatus was to file its reply brief on September9, 2009.

The plaintiffs have stated that they would prefer to litigate their lawsuit against Pilatus in the Eastern District of Pennsylvania. Their second choice of venue is the District of New Hampshire, and their third choice is Colorado. Because of their stated preference, the plaintiffs asked this Court to

withhold a decision on the question remanded by the Court of Appeals until the District Court in New Hampshire decides the motion to dismiss. See Pl.'s Br. at 3.

The Court is reluctant to delay this decision until then. Although the Court finds below that the plaintiffs have done nothing wrong in filing a protective lawsuit in New Hampshire while requesting transfer to Colorado, it would be inappropriate to allow the plaintiffs to dictate to the Court when it should decide a question remanded to it by the Court of Appeals. In addition, the non-Pilatus defendants are entitled to know whether the Court will sever the claims against them from those against Pilatus. The Court, therefore, will decide whether transfer to Colorado is appropriate.

In their briefs, both parties apply the legal standard used by the First Circuit in their decision in Britell v. United States, 318 F.3d 70 (1st Cir. 2003), when analyzing this question. Britell concerned the transfer of a party's mistaken appeal to the First Circuit when the Federal Circuit had exclusive jurisdiction over the case. The petitioners moved to transfer the appeal from the First Circuit to the Federal Circuit under § 1631. The respondent opposed that transfer and asked the court to dismiss the appeal outright. The Britell court granted the petitioner's motion to transfer under the transfer statute.

In its analysis of that statute, the First Circuit concluded that § 1631's language creates a rebuttable presumption in favor of transfer and that "transfer, rather than dismissal, is the option of choice." Id. at 74. The court reasoned that this

presumption serves the purposes for which Congress created the statute. First, the statute serves to protect litigants against "statutory imprecision and lawyers' errors." Id. Second, the statute eliminates the incentive for wasteful double filing. Finally, the statute furthers "the salutary policy favoring the resolution of cases on the merits." Id. Transfer is therefore "presumptively preferable because the dismissal of an action or appeal that might thrive elsewhere is not only resource-wasting but also justice-defeating." Id.

Applying that standard to this case, the presumption for transfer is not overcome. Despite Pilatus's protestations to the contrary, transfer in this case serves at least one of the purposes for which § 1631 was created. Although it is true that this is not a case of rectifying a mere "inadvertent filing error," Pilatus Opp'n at 2, it does serve "the salutary policy favoring the resolution of cases on the merits" to send the case to Colorado, where the Court of Appeals has found there is prima facie evidence that a court has general jurisdiction over Pilatus.

The Britell court, however, provided three scenarios in which the presumptive preference for transfer could be rebutted. First, transfer is not warranted if the transfer would unfairly benefit the proponent. Second, justice would not be served if transfer would impose an unwarranted hardship on an objector. And finally, transfer would not be appropriate if transfer in a particular case would unduly burden the judicial system. Id.

Under the first of these factors, unfair benefit to the plaintiff, the plaintiffs' benefit in transfer is no more than the ability to try their case against the

party that they claim is the "primary defendant in this product liability action." Pl.'s Br. at 7. The applicable statute of limitations has expired on all of the plaintiffs claims against Pilatus. If this motion were to be denied and the New Hampshire court were to find that it lacks jurisdiction over Pilatus, the plaintiffs' claims against Pilatus would be lost. Like the petitioners in Britell, then, the plaintiffs "had nothing to gain–and much to lose–by filing [their claims] in the wrong court." Britell, 318 F.3d at 75. Transfer to Colorado provides the plaintiffs with the benefit of having its day in court, a benefit that can hardly be deemed "unfair."

Nor would there be an unwarranted hardship to Pilatus. The only hardship Pilatus claims is the cost of having had todefend its case in more than one court. See Pilatus's Opp'n at9-10. It is irrelevant to this analysis that the case was originally brought in the wrong court or courts. In fact, that is the very defect that § 1631 was enacted to correct. There is no showing that the plaintiffs have filed any of their claims in bad faith. The plaintiffs state that they "filed their action in Pennsylvania believing, in good faith, that specific jurisdiction existed over Pilatus in Pennsylvania." See Pl.'s Reply at 6. The costs of litigation in Colorado do not amount to an unwarranted hardship to Pilatus. They are the result of a "judicial system that often provides multiple forums for plaintiffs to bring their claims." Id. at 9 n.2.

Finally, although the plaintiffs and the Court recognize "a measure of inefficiency" in litigating this case in the district courts of as many as three states, it may very well be that, as plaintiffs put it, "this litigation was destined to be divided in multiple

forums through no fault of any party." Pl.'s Br. at 9-10. Transfer, therefore, will not unduly burden the judicial system.

The next question is whether the Court should sever the claims against Pilatus from the claims against the remaining defendants under Federal Rule of Civil Procedure 21. When deciding whether to sever a claim under Rule 21, a court should balance "several considerations, including the convenience of the parties, avoidance of prejudice to either party, and promotion of the expeditious resolution of the litigation." Official Comm. Of Unsecured Creditors v. Shapiro, 190 F.R.D. 352, 355 (E.D.Pa.2000) (internal quotations omitted).

Those factors all point to severance in this case. The non-Pilatus defendants will not be prejudiced by transfer. There is no showing that the presence of Pilatus is essential to the non-Pilatus defendants' ability to defend themselves from the plaintiffs' specific claims against them. As with any complex litigation, the courts involved will coordinate discovery to ensure that wasteful duplication is avoided, easing any concerns about cost or inefficiency. And, should the non-Pilatus defendants feel that it is essential that their case be tried in conjunction with Pilatus, they could submit to the jurisdiction of the district court in Colorado.

Nor is there prejudice to Pilatus. Pilatus makes no claim that presence of the non-Pilatus defendants is essential to its defense. See Subelt Corp. v. Noble, Denton & Assoc., 5 F.3d28, 33-34 (3d Cir. 1993) (maintaining that a court "should not sever if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that

partial transfer would require the same issues to be litigated in two places"). Finally, denying the motion to sever would prejudice the plaintiffs, for all of the reasons discussed above.

For the reasons stated herein, the plaintiffs' request that the claims against Pilatus Aircraft, Ltd., be severed and transferred to a Federal District Court in Colorado is granted.

An appropriate Order shall issue separately.

APPENDIX F

ORDER DENYING D'JAMOOS' PETITION FOR REHEARING EN BANC (JUNE 24, 2009)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2690

THERESA D'JAMOOS, As Executrix of the Estate of Dawn Elizabeth Weingeroff; FREDERICK L. WEINGEROFF, Administrator of the Estate of Leland C. Weingeroff & Executor of the Estate of Gregg C. Weingeroff; STANLEY J. WACHTENHEIM, Executor of the Estate of Jeffrey M. Jacober; MICHAEL A. JACOBER; DAVID S. JACOBER, Co-Executors of the Estate of Karen L. Jacober & Co-Administrators of the Estate of Eric B. Jacober

v.

PILATUS AIRCRAFT LTD.; PILATUS FLUGZEUGWEKE AKTIENGESELLSCHAFT; ROSEMOUNT AEROSPACE, INC.; REVUE THOMMEN AC; EMCA; GOODRICH AVIONICS SYSTEMS, INC.; L-3 COMMUNICATIONS CORPORATION; GOODRICH CORPORATION

Theresa D'Jamoos; Frederick L. Weingeroff; Stanley J. Wachtenheim; Michael A. Jacober; David S. Jacober,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-07-cv-01153) Honorable Mary
A. McLaughlin, District Judge

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, and SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN,

HARDIMAN, and GREENBERG, Circuit Judges, and ACKERMAN, District Judge*

The petition for rehearing filed by appellants, Theresa D'Jamoos, as executrix of the estate of Dawn Elizabeth Weingeroff, Frederick L. Weingeroff, Administrator of the Estate of Leland C. Weingeroff & Executor of the Estate of Gregg C. Weingeroff, Stanley J. Wachtenheim, Executor of the Estate of Jeffrey M. Jacober, Michael A. Jacober and David S. Jacober, Co-Executors of the Estate of Karen L. Jacober & Co-Administrators of the Estate of Eric B. Jacober, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote and Judge Ackerman's vote are limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: 24 June 2009

*The Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

APPENDIX G

ORDER DENYING PILATUS' PETITION FOR REHEARING EN BANC (JUNE 24, 2009)

UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

No. 08-2690

THERESA D'JAMOOS, As Executrix of the Estate of Dawn Elizabeth Weingeroff; FREDERICK L. WEINGEROFF, Administrator of the Estate of Leland C. Weingeroff & Executor of the Estate of Gregg C. Weingeroff; STANLEY J. WACHTENHEIM, Executor of the Estate of Jeffrey M. Jacober; MICHAEL A. JACOBER; DAVID S. JACOBER, Co-Executors of the Estate of Karen L. Jacober & Co-Administrators of the Estate of Eric B. Jacober

v.

PILATUS AIRCRAFT LTD.; PILATUS FLUGZEUGWEKE AKTIENGESELLSCHAFT; ROSEMOUNT AEROSPACE, INC.; REVUE THOMMEN AC; EMCA; GOODRICH AVIONICS SYSTEMS, INC.; L-3 COMMUNICATIONS CORPORATION; GOODRICH CORPORATION

Theresa D'Jamoos; Frederick L. Weingeroff; Stanley J. Wachtenheim; Michael A. Jacober; David S. Jacober,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-07-cv-01153) Honorable Mary A.
McLaughlin, District Judge

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, and SLOVITER,
MCKEE, RENDELL,
BARRY, AMBRO, FUENTES, SMITH, FISHER,
CHAGARES,
JORDAN,

HARDIMAN, and GREENBERG, Circuit Judges, and
ACKERMAN, District Judge*

The petition for rehearing filed by appellee, Pilatus Aircraft Ltd., in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote and Judge Ackerman's vote are limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: 24 June 2009

*The Honorable Harold A. Ackerman, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

APPENDIX H

PA. CONST. art 1, § 11

§ 11. Courts to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Supreme Court, U.S.
FILED
MAR 4 - 2010
OFFICE OF THE CLERK

No. 09-489

IN THE

Supreme Court of the United States

THERESA D'JAMOOS, ET AL.,
Petitioners,

v.

PILATUS AIRCRAFT, LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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March 2010

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QUESTIONS PRESENTED

Petitioners represent the estates of six persons who perished aboard an aircraft that crashed in Pennsylvania. The aircraft was manufactured in Europe by respondent, a Swiss company, which sold the aircraft in Europe to a French purchaser. After several sales and resales in Europe not involving respondent, the aircraft was eventually purchased by a Rhode Island company that owned and operated the aircraft at the time of the accident. Petitioners brought this action in district court in Pennsylvania against respondent. In an interlocutory decision, the Third Circuit affirmed the district court's determination that it lacked personal jurisdiction, but vacated the district court's decision not to transfer the case to Colorado in lieu of dismissal, and remanded for further proceedings. Petitioners filed a petition for certiorari to this Court, and then, upon remand, obtained an order from the district court transferring the case to Colorado. Petitioners later voluntarily dismissed this Pennsylvania/Colorado action, the one underlying this petition, in order to avert dismissal of a subsequently-filed protective suit in the District of New Hampshire, which sustained jurisdiction over respondent and where petitioners are now actively prosecuting their claims related to the accident.

The questions presented are:

1. Whether petitioners' voluntary dismissal of the remanded action following transfer to the Colorado district court divests this Court of jurisdiction to entertain their petition for certiorari.

2. Even if petitioners had not voluntarily dismissed this case, whether a purported circuit split on the limits of stream-of-commerce personal jurisdiction theory for purposes of establishing specific personal jurisdiction would warrant review on certiorari, in a case where the product at issue was not sold through the stream of commerce.

3. Even if the underlying action had not been voluntarily dismissed by petitioners, and then, even if this Court were to consider the merits, whether the court of appeals correctly applied settled law that specific jurisdiction does not exist when the litigation does not "arise out of or relate to" activities directed to the forum.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

A. Factual Background 1

B. Procedural Background 2

(1) The Pennsylvania Action and Dismissal . 2

(2) The Third Circuit Appeal and Interlocutory Decision 3

(3) The Petition for Certiorari 5

(4) The Transfer of the Action on Remand . 5

(5) Petitioners' Voluntary Dismissal of the Colorado Action In Favor of the Subsequently Filed Action Pending in New Hampshire 6

REASONS FOR DENYING THE WRIT 7

I. PETITIONERS' VOLUNTARY DISMISSAL OF THE REMANDED AND TRANSFERRED ACTION DIVESTS THIS COURT OF JURISDICTION TO CONSIDER THE PRIOR INTERLOCUTORY RULING. 7

II. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, IT WOULD NOT IMPLICATE THE CIRCUIT SPLIT IDENTIFIED BY PETITIONERS, AND THUS WOULD NOT PROVIDE A VEHICLE FOR ADDRESSING SUCH SPLIT. 9

III. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, AND EVEN IF THIS COURT WERE TO CONSIDER THE MERITS, IT WOULD SEE THAT THE THIRD CIRCUIT PROPERLY APPLIED WELL SETTLED LAW THAT SPECIFIC JURISDICTION APPLIES ONLY TO CLAIMS "ARISING FROM OR RELATED TO" ACTIVITIES DIRECTED TOWARD THE FORUM. 15

CONCLUSION 16

APPENDIX

Appendix A: No. 08-0108, District Court of New Hampshire, Order (Nov. 9, 2009) 1b

Appendix B: No. 09-2583, District Court of Colorado, Plaintiffs' Notice of Dismissal without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) (Nov. 13, 2009) 21b

Appendix C: No. 09-2583, District Court of Colorado, Order of Dismissal without Prejudice (Nov. 16, 2009) 23b

TABLE OF AUTHORITIES

CASES

A. Uberti & Co. v. Leonardo,
892 P.2d 1354 (Ariz. 1995) 10

Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.,
148 U.S. 372 (1893) 8

Asahi Metal Indus. Co., Ltd. v. Super. Ct.,
480 U.S. 102 (1987) 2, 9, 14

Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994) 10

Bearry v. Beech Aircraft Corp.,
818 F.2d 370 (5th Cir. 1987) 13

Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967) 8

Boit v. Gar-Tec Prods., Inc.,
967 F.2d 671 (1st Cir. 1992) 10

Burger King v. Rudzewicz,
471 U.S. 462 (1985) 14, 15

Ex Parte DBI, Inc.,
23 So.3d 635 (Ala. 2009) 10

Fidelity and Cas. Co. of N.Y. v. Philadelphia Resins Corp.,
766 F.2d 440 (10th Cir. 1985) 13

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 16

Hill v. Showa Denko, K.K.,
425 S.E.2d 609 (W.Va. 1992) 10

Kernan v. Kurz-Hastings, Inc.,
175 F.3d 236 (2d Cir. 1999) 10

Kuenzle v. HTM Sport-Und Freizeitgerate AG,
102 F.3d 453 (10th Cir. 1996) 13

Lesnick v. Hollingsworth & Vose Co.,
35 F.3d 939 (4th Cir. 1994) 10

Luv N' Care, Ltd. v. Insta-Mix, Inc.,
438 F.3d 465 (5th Cir. 2006) 10

Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773 (7th Cir. 2003) 14

Tobin v. Astra Pharms. Prods., Inc.,
993 F.2d 528 (6th Cir. 1993) 10

World-Wide Volkswagon Corp. v. Woodson,
444 U.S. 286 (1980) 4

STATUTES

28 U.S.C. § 1254(1) 7
28 U.S.C. § 1631 ..... 2, 3, 5

RULES

Fed. R. Civ. P. 41(a) 7
Fed. R. Civ. P. 54(b) 3

STATEMENT OF THE CASE

A. Factual Background

On March 26, 2005, a PC-12 aircraft manufactured in 1999 by respondent Pilatus Aircraft, Ltd., a Swiss manufacturer, crashed in Pennsylvania, killing all six people aboard. Pet. App. 31a. The crash occurred as the plane was landing on a stopover on its way from Florida to Rhode Island. *Id.* Petitioners are the personal representatives of the victims' estates. *Id.*

Respondent originally sold the accident aircraft to a French buyer, which in turn resold the aircraft to a (different) Swiss company. *Id.* at 34a. The Swiss company in turn resold it to a Massachusetts company, which brought the aircraft to the U.S. in 2003. *Id.* The plane was then resold to a Rhode Island company, which operated the aircraft out of Rhode Island when it crashed. *Id.* It is undisputed that respondent was not involved in any of the aircraft's resales that led to aircraft's use in the U.S. *Id.*

It is equally undisputed that a Pilatus aircraft for sale for the U.S. is typically first sold by respondent to its U.S. subsidiary in Colorado, Pilatus Business Aircraft, Ltd. ("PilBAL"). *Id.* at 32a. PilBAL then sells the plane to one of PilBAL's independent dealers, which then sells it to a retail customer. *Id.* Even under that system, the record shows no sales to Pennsylvania retail customers through PilBAL independent dealers. *Id.* at 36a. The accident aircraft, however, did not go through this U.S. distribution system. Rather, as described above, the aircraft was sold to a European buyer, and made its way to the U.S.

through a series of purely fortuitous sales, entirely outside of respondent's U.S. distribution system.

B. Procedural Background

(1) The Pennsylvania Action and Dismissal

In March 2007, petitioners filed suit against respondent and various other component part manufacturers in the United States District Court for the Eastern District of Pennsylvania under a product liability theory. *Id.* at 37a-38a. Respondent moved to dismiss for lack of personal jurisdiction, which petitioners opposed. After oral argument on the motion, when it became apparent to petitioners that the motion to dismiss might be granted, petitioners: (1) filed an alternative motion, asking the district court, in the event it decided that it lacked jurisdiction, to transfer the case under 28 U.S.C. § 1631 to Colorado, home of Respondent's subsidiary PilBAL (*id.* at 21a); and (2) filed a duplicative, protective case against respondent in the United States District Court for the District of New Hampshire. *Id.* at 72a.

On April 30, 2008, the Pennsylvania district court granted respondent's motion to dismiss for lack of personal jurisdiction. The district court rejected petitioners' argument that specific jurisdiction existed in Pennsylvania, (a) because respondent's forum contacts were insufficient and unrelated to petitioner's claims and (b) because "stream of commerce" theory could not apply to satisfy minimum contacts for two reasons. First, under either of the tests for "stream of commerce" specific jurisdiction articulated by fractured pluralities in *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102 (1987), respondent "has not

injected its goods into the forum state with a reasonable expectation of deriving a substantial benefit." Pet. App. 12a. Second, even if respondent's distribution system in the U.S. could be considered as having injected respondent's planes into Pennsylvania with such expectations, "the subject aircraft did not enter Pennsylvania through any stream of commerce." *Id.* at 14a. Instead, respondent sold the aircraft to a European customer, and the aircraft arrived in the U.S. only by the happenstance of third-party resales. *Id.* Thus, asserting personal jurisdiction over respondent would not satisfy the "arise out of or relate to" test of specific jurisdiction. *Id.*[1]

At the same time, the district court denied petitioners' motion to transfer pursuant to 28 U.S.C. § 1631 in lieu of dismissal because petitioners did not demonstrate that the putative forum, Colorado, had personal jurisdiction over respondent. *Id.* at 27a. After the district court certified the rulings pursuant to Fed. R. Civ. P. 54(b), petitioners appealed both rulings to the Third Circuit.

(2) The Third Circuit Appeal and Interlocutory Decision

On appeal, petitioners relied exclusively on specific jurisdiction, advancing two arguments, both of which the Third Circuit rejected.

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[1] The district court also rejected petitioners' arguments that general jurisdiction existed in Pennsylvania, an argument abandoned at the Third Circuit and not pressed here. Pet. App. 18a-20a.

First, respondents argued that because respondent "targets the United States market as a whole, it has purposeful affiliation with every state and must expect to be sued in every state where one of its aircraft crashes." *Id.* at 44a. The Third Circuit rejected this argument because respondent's efforts to exploit a national market "simply do not constitute the type of deliberate contacts within Pennsylvania that could amount to a purposeful availment of the privilege of conducting activities in that state." *Id.* at 45a. In any event, even if respondent's very limited contacts with Pennsylvania could amount to "purposeful availment" of the privilege of conducting business in Pennsylvania, petitioners could not satisfy the requirement that claims "arise out of or relate to" such purposeful availment, because the aircraft at issue was originally sold in Europe with no connection to respondent's activities in the U.S. and Pennsylvania. *Id.* at 47a.

Second, petitioners argued that specific jurisdiction exists under a stream of commerce theory, because it was foreseeable that one of its highly mobile aircraft would eventually find its way to Pennsylvania. *Id.* at 48a. The Third Circuit rejected this argument, too, for two reasons. First, the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. *Id.* Further, this Court has rejected the contention that the foreseeability analysis is influenced by the highly mobile nature of the product at issue. *Id.* (citing *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 296 n.11 (1980)). Second, "it is absolutely fatal to [petitioners'] stream-of-commerce argument that the subject aircraft did not actually enter Pennsylvania through a 'stream of commerce' as that term is

generally understood." *Id.* at 49a. That is to say, the accident aircraft had not entered Pennsylvania as a result of being placed in the stream of commerce in the U.S. through respondent's U.S. distribution system. *Id.* at 49a-51a. To hold otherwise would impermissibly remove the "arising from or related to" requirement from the specific jurisdiction test "and unjustifiably treat the stream-of-commerce theory as a source of general jurisdiction." *Id.* at 50a.

While thus affirming the district court's dismissal for lack of specific jurisdiction, the Third Circuit nevertheless reversed the Pennsylvania district court's ruling denying the petitioners' motion to transfer to Colorado, finding that petitioners had demonstrated prima facie evidence of general jurisdiction over respondent in Colorado, based on respondent's contacts with its subsidiary there. *Id.* at 58a. The Third Circuit remanded to the Pennsylvania district court the issue of whether the transfer was in the "interests of justice" as required by 28 U.S.C. § 1631. *Id.* at 59a.

(3) The Petition for Certiorari

On July 23, 2009, Petitioners requested an extension to file their certiorari petition, which was granted. On October 22, 2009, Petitioners filed their petition, seeking review of the Third Circuit's affirmance of the jurisdictional dismissal.

(4) The Transfer of the Action on Remand

On remand, with the petition for certiorari in progress but no stay of any proceedings in effect, petitioners proceeded to move for, and obtained, an

order from the Pennsylvania district court severing petitioner's claims against respondent and transferring those claims—the same claims that underpin the petition for certiorari—to Colorado on October 1, 2009. *Id.* at 68a. With this transfer, petitioners had a forum of their election, with personal jurisdiction over respondent, in which to proceed on the merits of their claims against respondent.

(5) Petitioners' Voluntary Dismissal of the Colorado Action In Favor of the Subsequently Filed Action Pending in New Hampshire

So that petitioners would not have two cases pending against respondent concerning the same plane crash, respondent asked the New Hampshire district court to dismiss the action before it in favor of petitioner's first-filed Pennsylvania/Colorado action. Petitioners opposed that motion, telling the New Hampshire court that they preferred to litigate in the second-filed action in New Hampshire, and representing to the New Hampshire court that they would moot respondent's motion based on the prior pending Pennsylvania/Colorado action by voluntarily dismissing that case if the New Hampshire court found personal jurisdiction over respondent in New Hampshire. On November 9, 2009, the New Hampshire district court obliged, finding personal jurisdiction over respondent in New Hampshire, and denying respondent's motion to dismiss in favor of the first filed action in Colorado based on, and quoting, Petitioners' representation. Opp. App. at 17b-19b (New Hampshire Order).

On November 13, 2009, consistent with their representation to the New Hampshire court,

petitioners voluntarily dismissed the Colorado action, and on November 16, 2009, the Colorado district court entered a dismissal order accordingly. Opp. App. at 21b-24b. Thus, the action giving rise to the Third Circuit appeal and to the petition for certiorari before this Court was formally terminated, and no longer exists.

Petitioners and respondent then filed, in the only remaining action in New Hampshire, a joint discovery plan approved by the court, a trial date was set, and the parties have commenced merits discovery and are actively litigating petitioners' claims.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' VOLUNTARY DISMISSAL OF THE REMANDED AND TRANSFERRED ACTION DIVESTS THIS COURT OF JURISDICTION TO CONSIDER THE PRIOR INTERLOCUTORY RULING.

Respondent's voluntary dismissal of the remanded action entirely moots their petition for certiorari review of the Third Circuit's interlocutory decision, because the underlying action no longer exists. A voluntary dismissal under Rule 41(a), Fed.R.Civ.P. extinguishes litigation and divests the courts – all courts – of any further jurisdiction. The Supreme Court's jurisdiction over certiorari review from cases in the courts of appeals, as provided under 28 U.S.C. § 1254(1), contemplates the grant of a writ "upon the petition of any party to any civil . . . case . . . ." Following petitioners' voluntary dismissal of the case against respondent, there is no party and there is no civil case.

Because petitioners voluntarily abandoned the suit that is the subject of this petition for certiorari (in order to proceed with the subsequently filed, identical action in New Hampshire and avoid its dismissal as a prior pending action), this Court not only has no reason to review the Third Circuit's interlocutory decision, it has no subject matter jurisdiction to do so. There is no action still in existence in Colorado to return to Pennsylvania.[2]

Whether petitioners' dismissal of the underlying case following transfer to Colorado is considered to divest this Court of appellate jurisdiction, or to moot

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[2] Even prior to the voluntary dismissal, the petition would have been premature because the Third Circuit's decision was interlocutory, as it remanded for further proceedings rather affirming the district court's initial dismissal of respondents' action for lack of jurisdiction. On remand, the district court transferred the action to the district court in Colorado, where respondent did not challenge jurisdiction. In the normal course, this petition would be premature, because petitioners would have been free to seek review of the Third Circuit's interlocutory jurisdictional determination as part of any petition for certiorari from any ensuing and otherwise final decision of the Tenth Circuit. Any number of intervening circumstances might have made review by this Court ultimately unnecessary, such as petitioners prevailing on the merits of their claim in Colorado. For that reason, if the remanded and transferred action were pending in Colorado, this Court's normal practice would to be deny certiorari at this interlocutory stage of the case. *Cf. Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). As this Court recognized long ago, "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893).

the petition, or to seek an advisory opinion with no case or controversy remaining, or to constitute a waiver of petitioners' right to proceed with its petition (or an implicit withdrawal of it), the effect is the same. This action which, after petitioning for certiorari review, the petitioners later voluntarily and deliberatively abandoned in order to litigate the same claims, arising from the same accident, in the subsequently filed New Hampshire case. Petitioners abandoned this case to fulfill their promise to the New Hampshire court that they would dismiss their prior pending case if that court determined it had jurisdiction over respondent there.

In sum, there is simply nothing remaining for this Court to do here.

II. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, IT WOULD NOT IMPLICATE THE CIRCUIT SPLIT IDENTIFIED BY PETITIONERS, AND THUS WOULD NOT PROVIDE A VEHICLE FOR ADDRESSING SUCH SPLIT.

The Petition exclusively concerns the limits of basing specific jurisdiction on "stream of commerce" theory, i.e., where specific jurisdiction derives from "the regular and anticipated flow of products from manufacture to distribution to retail sale" (*see Asahi*, 480 U.S. at 117 (Brennan, J. concurring)). Pet. at 7-20.

Petitioners contend that the circuit courts have split between (1) cases where a defendant's targeting of the United States, as a whole, with its stream of commerce is sufficient to subject that defendant to personal jurisdiction in a particular state, and

(2) cases where the court requires the defendant to target the specific forum state with its stream of commerce. *See id.* at 3. Thus, each of the cases cited by petitioners as evidence of the proffered split involves allegedly defective products arriving in the national or local forum via the manufacturer's stream of commerce.[3]

However, this was not such a case. As both the district court and court of appeals expressly

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[3] *See, e.g., Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 940-41 (4th Cir. 1994) (filters in question allegedly containing asbestos were sold to a tobacco company who incorporated the filters into cigarettes sold to a distributor for sale in Maryland); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 673 (1st Cir. 1992) (air gun at issue allegedly was sold to a national catalog retailer and resold to customer in Maine); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 610-11 (8th Cir. 1994) (fireworks in question were made in Japan and sold to a South Dakota distributor, which distributed them to Nebraska where they injured plaintiff); *Luv N' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 468 (5th Cir. 2006) (allegedly infringing product sold to Walmart, which distributed it to one of its stores in Louisiana); *Tobin v. Astra Pharms. Prods., Inc.*, 993 F.2d 528-532, 543-44 (6th Cir. 1993) (manufacturer contracted with a national distributor which sold the allegedly harmful drug to doctor Kentucky who prescribed it to plaintiff); *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 239-40 (2d Cir. 1999) (stamping press was sold through manufacturer's American distributor to New York, where it injured the plaintiff); *A. Uberti & Co. v. Leonardo*, 892 P.2d 1354, 1356 (Ariz. 1995) (firearm was sold through manufacturer's sole United States distributor to plaintiff in Arizona); *Hill v. Showa Denko, K.K.*, 425 S.E.2d 609, 656 (W.Va. 1992) (contaminated drug sold by manufacturer's wholly owned subsidiary and only American distributor to processor that sold it to a pharmacy in West Virginia); *Ex Parte DBI, Inc.*, 23 So.3d 635, 639 (Ala. 2009) (seat belt manufactured in South Korea was incorporated into a new car later sold in an dealership in Alabama).

recognized, and as petitioners do not and cannot dispute, the product here (the aircraft) did *not* go through respondent's stream of commerce. The plane was sold in Europe to a French buyer, and only reached the United States, and ultimately Pennsylvania, because of entirely haphazard and unforeseeable third party resales having nothing to do with respondent. Respondent's "regular and anticipated flow" of planes to American customers is through its U.S. subsidiary, PilBAL, and through PilBAL's network of independent dealers. Thus, even if the underlying case here were still pending, there would be no reason for this Court to grant certiorari to resolve a circuit split on an issue that was never presented in the case.

As the district court and Third Circuit concluded, because the aircraft did not actually go through the stream of commerce (Pilatus to PilBAL to independent dealers to customers), stream of commerce theory cannot provide a basis for specific jurisdiction over respondent in Pennsylvania.

The Third Circuit explained:

> In any event, it is absolutely fatal to [petitioners'] stream of commerce argument that the subject aircraft did not actually enter Pennsylvania through a 'stream of commerce' as that term is generally understood-i.e., 'the regular and anticipated flow of products from manufacture to distribution to retail sale. . . .' Any 'stream' of planes from Pilatus to Pennsylvania would begin with Pilatus's manufacture of the and be followed by Pilatus's sale of them to PilBAL. Then PilBAL would

distribute the planes to [the independent dealer], and finally [the independent dealer] would sell the planes to buyers in Pennsylvania. It is by this path—from the Swiss manufacturing facility to PilBAL to regional dealer to end purchaser—that Pilatus targets the American market and intends and expects its aircraft to reach customers in the United States, including, arguably, those in Pennsylvania.

If the claim in this case had arisen out of these efforts to serve, even indirectly, the Pennsylvania market, then it would make sense to evaluate Pilatus's conduct under the stream-of-commerce theory. . . . It is undisputed, however, that the aircraft involved in this cases did not follow the foregoing regular and anticipated path to Pennsylvania. Rather, Pilatus sold the aircraft to a French buyer who resold it to a Swiss company (not Pilatus) that, in turn, resold it to a Massachusetts company that brought it to the Untied States and sold it to the Rhode Island company, its owner at the time of the accident.

By arguing that a stream-of-commerce analysis could support jurisdiction even when the product at issue did not go through the 'stream,' [petitioners] essentially ask us to find that the stream-of-commerce theory provides an independent source of personal jurisdiction over Pilatus, a source unrelated to [petitioners'] claims. However, the fact that *other* Pilatus planes have followed a certain path to Pennsylvania and other states cannot provide

> the necessary connection between Pilatus and Pennsylvania to support specific jurisdiction in this case, because the aircraft involved here reached Pennsylvania by a series of fortuitous circumstances independent of any distribution channel Pilatus employed. If we held otherwise, we impermissibly would remove the 'arising from or related to' requirement from the specific jurisdiction test and unjustifiably would treat the stream-of-commerce theory as a source of general jurisdiction.

(Pet. App. at 49a-50a.) (citations omitted, italics in original.)

Consistent with the Third Circuit's decision, there is no inter-circuit conflict, but rather overriding and consistent agreement, that stream of commerce theory is inapplicable where the product did not actually go through the stream of commerce, but rather reached the forum some other way.[4]

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[4] *See, e.g., Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 459 (10th Cir. 1996) (holding Utah had no personal jurisdiction because although the manufacturer sold many ski bindings in United States, the specific ski bindings were bought in Europe and brought to Utah by the plaintiff); *Fidelity and Cas. Co. of N.Y. v. Philadelphia Resins Corp.*, 766 F.2d 440, 446 (10th Cir. 1985) (finding no personal jurisdiction where plaintiff brought cables from Arkansas, where they were sent by seller, to Utah, where they failed, noting the "distinction" between stream of commerce cases and cases where "the defendant's product comes into the forum state as the result of the actions of an unconnected third party or of fortuitous events over which the defendant has no control ... [in those cases] the defendant is not subject to jurisdiction in the forum state"); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987) (holding "[a] conclusion that

Said differently, the petitioners' claim here arises from respondent's sale of an aircraft in Europe, as part of sales activities directed toward Europe. Because petitioners' suit does not arise from respondent's activities in the U.S., much less Pennsylvania, the Third Circuit correctly applied settled law and held that the district court could not assert specific jurisdiction over respondent.

Petitioners suggest that the Court resolve the uncertainty created by the fractured plurality decisions in *Asahi*, 480 U.S. at 102. But resolving the differing *Asahi* plurality views would not have resolved the issue in this case of personal jurisdiction over respondent in Pennsylvania. Like the cases cited for the petitioners' asserted inter-circuit split, *Asahi* and the cases that follow any of its pluralities presuppose that the product at issue *actually traveled through the stream of commerce*. *See id.* at 106-07 (a tire valve assembly that allegedly harmed plaintiff was sold by manufacturer to tire manufacturers that distribute

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there is a stream of commerce ensures that the contact that caused harm in the forum occurred there through the defendant's conduct and not the plaintiff's unilateral activities; it does not ensure that defendant's relationship with the forum is continuous and systematic, such that it can be sued there" for products with no connection to the forum); *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 788 (7th Cir. 2003) (holding stream of commerce theory "is relevant only to the exercise of specific jurisdiction; it provides no basis for exercising general jurisdiction over a nonresident defendant"); *see also Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) (noting a defendant cannot be "haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or the 'unilateral activity of another party or a third person.'") (internal citations omitted.)

their tires to the forum state). That was simply not the case here.

Finally, Petitioners' own question presented assumes that the case arises out of or is related to the alleged purposeful availment of a national market: "Does purposeful availment of the market of the United States as a whole, which creates general jurisdiction over federal claims, also create specific jurisdiction in a state in which harm occurs *as a result of purposeful availment of the national market*." Pet. at i (emphasis added.) In this case, the harm that occurred did not result from any purposeful availment by respondent of the U.S. market, because the sale of the accident aircraft resulted from the respondent's actions directed toward the European, rather than U.S., market. Thus, this case is the wrong vehicle for deciding the question presented by petitioners.

III. EVEN IF THIS CASE HAD NOT BEEN VOLUNTARILY DISMISSED, AND EVEN IF THIS COURT WERE TO CONSIDER THE MERITS, IT WOULD SEE THAT THE THIRD CIRCUIT PROPERLY APPLIED WELL SETTLED LAW THAT SPECIFIC JURISDICTION APPLIES ONLY TO CLAIMS "ARISING FROM OR RELATED TO" ACTIVITIES DIRECTED TOWARD THE FORUM.

Under this Court's cases, and as the Third Circuit expressly recognized, it is settled law that specific jurisdiction can only apply where (1) a defendant has purposefully directed activities at the forum, and (2) the litigation arises out of or relates to such activities. *See* Pet. App. 42a (citing *Burger King v.*

Rudzewicz, 471 U.S. 462, 472 (1985) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). There is no dispute here that respondent's inconsequential activities in the forum (Pennsylvania) not only failed to meet the purposeful availment standard, but had nothing to do with the litigation. Absent anything in the record to show the aircraft's entry into the forum through a regular stream of commerce, application of this settled law compelled the conclusion reached in both the trial and appellate courts that there was no specific jurisdiction over Pilatus in Pennsylvania. Such settled law having been correctly applied, there is no purpose to be served by further review and affirmance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: No. 08-0108, District Court of New Hampshire, Order (Nov. 9, 2009) 1b

Appendix B: No. 09-2583, District Court of Colorado, Plaintiffs' Notice of Dismissal without Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) (Nov. 13, 2009) 21b

Appendix C: No. 09-2583, District Court of Colorado, Order of Dismissal without Prejudice (Nov. 16, 2009) 23b

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No. 08-cv-108-SM
Opinion No. 2009 DNH 170

[Filed November 9, 2009]

Theresa D'Jamoos, as Executrix of the Estate of Dawn Weingeroff, et al., Plaintiffs,	)
v.	)
Atlas Aircraft Center, Inc. and Pilatus Aircraft, Ltd., Defendants.	)

ORDER

In March of 2005, a Pilatus PC-12 aircraft that had taken off from Naples, Florida, crashed in State College, Pennsylvania, during an instrument landing approach. All six people on board died. This product liability and negligence action arises out of that accident. Plaintiffs invoke this court's diversity subject matter jurisdiction over their state law claims. See 28 U.S.C. § 1332.

The plane was based in Rhode Island and those on board were residents of Rhode Island. The plaintiffs – the estates of the six victims – have named as defendants Atlas Aircraft Center, Inc. ("Atlas"), a New Hampshire corporation, and Pilatus Aircraft, Ltd. ("Pilatus"), a Swiss corporation. Pilatus moves to dismiss all of plaintiffs' claims, asserting that it has insufficient contacts with the State of New Hampshire to support this court's exercise of personal jurisdiction over it. Plaintiffs, as well as Pilatus's co-defendant, Atlas, object.

For the reasons set forth below, Pilatus's motion to dismiss for lack of personal jurisdiction is denied, as is its motion to dismiss in favor of first-filed action.

Standard of Review

A. Personal Jurisdiction: Statutory and Constitutional Prerequisites.

It is well established that when this court's diversity subject matter jurisdiction is invoked, personal jurisdiction over a nonresident defendant is determined, at least in part, by the forum state's long-arm statute. See Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 690 (1st Cir. 1993). When personal jurisdiction is contested, the plaintiff bears the burden of establishing that the court has such jurisdiction. See Sawtelle v. Farrell, 70 F.3d 1381, 1387 (1st Cir. 1995); Kowalski v. Doherty, Wallace, Pillsbury & Murphy, 787 F.2d 7, 8 (1st Cir. 1986).

Allegations of jurisdictional facts are construed in the plaintiff's favor, see Buckley v. Bourdon, 682 F.

Supp. 95, 98 (D.N.H. 1988), and, if the court proceeds based upon the written submissions of the parties without an evidentiary hearing, the plaintiff need only make a prima facie showing that jurisdiction exists. See Kowalski, 787 F.2d at 8; Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 674-75 (1st Cir. 1992). Nevertheless, to defeat a motion to dismiss, plaintiff's demonstration of personal jurisdiction must be based on specific facts set forth in the record. See TicketMaster–New York, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994); Negron-Torres v. Verizon Communications, Inc., 478 F.3d 19, 23 (1st Cir. 2007). And, "[i]n reviewing the record before it, a court 'may consider pleadings, affidavits, and other evidentiary materials without converting the motion to dismiss to a motion for summary judgment.'" VDI Technologies v. Price, 781 F. Supp. 85, 87 (D.N.H. 1991) (quoting Lex Computer & Management Corp. v. Eslinger & Pelton, P.C., 676 F. Supp. 399, 402 (D.N.H. 1987)); see also Gar-Tec Products, 967 F.2d at 675-76.

Before a court may exercise personal jurisdiction over a non-resident defendant, the plaintiff must show, first, that the forum state's long-arm statute confers jurisdiction over the defendant, and second, that the exercise of jurisdiction comports with constitutional due process standards (by establishing that the defendant has sufficient "minimum contacts" with the forum state). See Kowalski, 787 F.2d at 9-10. New Hampshire's individual long-arm statute, N.H. Rev. Stat. Ann. ("RSA") 510:4, extends personal jurisdiction over foreign defendants "to the full extent that the statutory language and due process will allow." Phelps v. Kingston, 130 N.H. 166, 171 (1987). Likewise, New Hampshire's corporate long-arm statute, RSA 293-A:15.10, authorizes jurisdiction over foreign

corporations and unregistered professional associations to the full extent permitted by federal law. See Sawtelle, 70 F.3d at 1388. Stated another way, New Hampshire's individual and corporate long-arm statutes reach as far as the due process protection afforded by the federal constitution will allow. Accordingly, the court need only determine whether the exercise of personal jurisdiction over a foreign defendant would comport with federal constitutional guarantees.

To exercise personal jurisdiction over a foreign defendant in a manner consistent with the Constitution, the plaintiff must demonstrate that the defendant has "certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (citation and internal punctuation omitted). And, to conclude that a defendant has such "minimum contacts," the court must first be satisfied that the defendant's conduct bears such a "substantial connection with the forum State" that the defendant "should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-75 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

B. General v. Specific Jurisdiction.

A court may exercise either general or specific personal jurisdiction over a defendant. "General jurisdiction exists when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous

and systematic activity, unrelated to the suit, in the forum state." United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992); see also Negron-Torres, 478 F.3d at 25. Specific personal jurisdiction, on the other hand, exists when the plaintiff's cause of action arises directly out of, or relates to, the defendant's forum-based contacts. United Elec. Workers, 960 F.2d at 1088-89.

In an effort to assist trial courts in determining whether they may properly exercise specific personal jurisdiction, the Court of Appeals formulated a three-part test:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in¬state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Id. at 1089; see also Negron-Torres, 478 F.3d at 24. An affirmative finding as to each of those three elements – relatedness, purposeful availment, and reasonableness – is necessary to support the court's exercise of specific personal jurisdiction over a defendant. See Phillips Exeter Academy v. Howard Phillips Fund, Inc., 196 F.3d 284, 288 (1st Cir. 1999).

With those principles in mind, the court turns to Pilatus's motion to dismiss.

Background

The PC-12 is a single-engine turbo-prop aircraft. Pilatus manufactured the PC-12 at issue in Switzerland in 1999 and sold it in Europe to a French buyer. Following several intervening resales, the aircraft was purchased by a Rhode Island limited liability company and, in 2003, it was transported to the United States. According to plaintiffs, Atlas then inspected, serviced, and maintained the aircraft on a continuous basis prior to March 26, 2005 (the date of the crash).

Plaintiffs advance two causes of action against Pilatus, which, reduced to their essence, allege the following:

1. Pilatus negligently designed, manufactured, and tested the Pilatus PC-12 model aircraft – conduct (and/or omissions) that proximately caused the fatal crash (the "Defective Aircraft Claim").

2. Pilatus produced, sold, and otherwise distributed deficient maintenance manuals and specifications for the inspection and maintenance of the PC-12 and the procedures described in those manuals were followed, which proximately caused the fatal crash (the "Service Manuals Claim").

And, say plaintiffs, Pilatus has sufficient contacts with this forum to warrant the exercise of both general and specific personal jurisdiction over it. Pilatus disagrees.

Discussion

I. General Jurisdiction.

Although plaintiffs (and Defendant Atlas) assert that the court may properly exercise general personal jurisdiction over Pilatus, they have failed to demonstrate that Pilatus has engaged in continuous and systematic activity, unrelated to the suit, in this forum. See, e.g., D'Jamoos v. Pilatus Aircraft Ltd., 2008 WL 1902193 at *8-9 (E.D. Pa. April 30, 2008) (concluding, under similar factual circumstances, that that court lacked general personal jurisdiction over Pilatus), vacated in part on other grounds, 566 F.3d 94 (3d Cir. 2009).[1] See also Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 138 (1st Cir. 2006) ("The standard for evaluating whether defendants' alleged contacts satisfy the constitutional general jurisdiction test is considerably more stringent than that applied to specific jurisdiction questions.") (citation and internal punctuation omitted).

Most of the forum-based activity to which plaintiffs point was not carried out directly by Pilatus. Instead, it was performed by its wholly-owned, Colorado-based subsidiary, Pilatus Business Aircraft, Ltd. ("PBAL"). And, neither plaintiffs nor Atlas has attempted to

---

[1] Plaintiffs originally sued Pilatus in the United States District Court for the Eastern District of Pennsylvania. But, when it appeared that that court might not have personal jurisdiction over Pilatus, plaintiffs' added Pilatus as a defendant in this case. For a relatively brief period, then, there was parallel litigation in this forum and Pennsylvania. As noted below, however, the Pennsylvania action against Pilatus has since been transferred to the District of Colorado.

demonstrate that the court may properly exercise personal jurisdiction over Pilatus based upon the forum contacts of PBAL (e.g., they have not attempted to show that PBAL is a sham corporation, or an alter ego of Pilatus, or an agent of Pilatus). See, e.g., Andresen v. Diorio, 349 F.3d 8, 12 (1st Cir. 2003); Donatelli v. National Hockey League, 893 F.2d 459, 465 (1st Cir. 1990). As the District Court for the District of Massachusetts has observed:

> The First Circuit Court of Appeals has indicated that personal jurisdiction over parent companies "invariably" depends upon the finding of a "plus" factor, "something beyond the subsidiary's mere presence within the bosom of the corporate family." A plus factor of that sort exists 1) where the association between parent and subsidiary demonstrates an agency relationship between the two, 2) where the exercise of control by the parent over the subsidiary goes beyond that "degree of control innately inherent in the family relationship" or 3) where the subsidiary is "merely an empty shell." In all such cases, the parent's relationship to the subsidiary implies that it has availed itself of the benefits of the forum state where the subsidiary is subject to personal jurisdiction.

Ruiz v. Bally Total Fitness Holding Corp., 447 F. Supp. 2d 23, 27 (D. Mass. 2006) (citing Donatelli, 893 F.2d at 465-66); see also Platten, 437 F.3d at 139 ("The bar is set even higher in a case like this one, in which plaintiffs seek to disregard the corporate form. The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its

nonresident parent, even if the parent is sole owner of the subsidiary. There is a presumption of corporate separateness that must be overcome by clear evidence.") (citations and internal punctuation omitted).

Here, beyond merely identifying PBAL's substantial forum contacts, plaintiffs have not attempted to establish the existence of the "plus" factor identified by the court of appeals nor, necessarily, have they borne their burden of overcoming the presumption of corporate separateness by clear evidence.

II. Specific Jurisdiction.

A. The Service Manuals Claim.

Plaintiffs have, however, adequately demonstrated that the court may properly exercise specific personal jurisdiction over Pilatus (at least as to the Service Manuals Claim). Among other things, the parties' jurisdictional discovery has revealed that Pilatus sold more than 300 maintenance manuals, service bulletins, and other technical documents directly to Atlas, with knowledge that Atlas was using those documents to perform required annual and 100-hour inspections on at least some of the many PC-12 aircraft hangered in this state.[2] Such purposeful business-related contacts with this forum are sufficient

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[2] According to plaintiffs, "[t]he largest flying fleet of Pilatus PC-12 aircraft in the world is located in New Hampshire." Plaintiffs' memorandum in support of jurisdictional discovery (document no. 37) at 6.

for this court to exercise specific personal jurisdiction over Pilatus consistent with the requirements of due process. Stated somewhat differently, consideration of each of the relevant factors - relatedness, purposeful availment, and reasonableness – counsels in favor of the exercise of specific personal jurisdiction over Pilatus with respect to the Service Manuals Claim.

First, plaintiffs' claims against Pilatus relate to, and arise directly out of, Pilatus's sale of the maintenance manuals and service bulletins in this forum. See, e.g., Amended Complaint at paras. 50(e) & (f) (alleging that Pilatus "negligently provid[ed] maintenance specifications for t the inspection and maintenance of the airframe fuel filter and fail[ed] to provide adequate warnings relating thereto" and "negligently provid[ed] Service Bulletins, maintenance instructions, and other specifications for maintenance and inspection of the subject aircraft, and fail[ed] to provide adequate warnings relating thereto"). Here, the relationship between plaintiffs' Service Manuals Claim and Pilatus's sale of those allegedly defective service and maintenance manuals in this forum is neither attenuated nor indirect. See United Elec. Workers, 960 F.2d at 1089. Rather, Pilatus's sale of those manuals to Atlas forms an "important, or at least material, element of proof in the plaintiffs' case," id. (citation and internal punctuation omitted) because Atlas allegedly relied upon those materials when servicing the PC-12 at issue in this case. See generally Harlow v. Children's Hosp., 432 F.3d 50, 60-61 (1st Cir. 2005).

Next, by selling those maintenance manuals and service bulletins directly to Atlas, Pilatus purposefully availed itself of the privilege of conducting business

activities in this forum. "The function of the purposeful availment requirement is to assure that personal jurisdiction is not premised solely upon a defendant's 'random, isolated, or fortuitous' contacts with the forum state." Sawtelle, 70 F.3d at 1391 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)). Here, Pilatus's sales of maintenance and service manuals in the state of New Hampshire were not random, isolated, or fortuitous. Rather, they were knowing and purposeful. According to the record, Pilatus made such sales nearly every month from at least April of 2003 through February of 2008. Under those circumstances, Pilatus's contacts with this forum were both direct and voluntary. And, Pilatus certainly could have foreseen that, should there be a liability claim arising from alleged defects in one or more of those manuals, it would likely be haled into court in this forum. See Ticketmaster, 26 F.3d at 207 (describing "voluntariness" and "foreseeability" as the "cornerstones of purposeful availment").

Finally, the exercise of personal jurisdiction over Pilatus - at least as to plaintiffs' Service Manuals Claim - would be both fair and reasonable in light of the so-called "gestalt factors." Those factors are: (1) the burden on defendant to appear in the forum; (2) the interests of the forum state in adjudicating the plaintiff's claims; (3) the convenience of the plaintiff; (4) the interests of the judicial system in the effective and efficient administration of justice; and (4) the "common interests of all sovereigns in promoting substantive social policies." Sawtelle, 70 F.3d at 1395.

While defending against plaintiffs' claims in this forum is, to some extent, burdensome, Pilatus has not shown any "special or unusual burden." Pritzker v.

Yari, 42 F.3d 53, 64 (1st Cir. 1994). This is particularly true since, eventually, Pilatus will have to defend against plaintiffs' claims in some forum in this country, whether it be New Hampshire or Colorado. See D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 108 (3d Cir. 2009) ("[Plaintiffs] have made a prima facie showing that, given Pilatus's direct contacts within Colorado, the exercise of general jurisdiction over Pilatus in Colorado would comport with due process.").[3]

As for New Hampshire's interest in providing a judicial forum for the parties' dispute, the court of appeals has noted that a state has a "demonstrable interest in exercising jurisdiction over one who causes tortious injury within its borders." Ticketmaster, 26 F.3d at 211. Additionally, the court of appeals "has repeatedly observed that a plaintiff's choice of forum must be accorded a degree of deference with respect to the issue of its own convenience." Sawtelle 70 F.3d at 1395. Here, given the fact that one of the defendants – Atlas – resides in New Hampshire, it certainly makes sense that plaintiffs would prefer to litigate their negligence and product liability claims here (given, for

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[3] Unless overturned by the Supreme Court, that decision is law of the case and, therefore, binding on the parties and the district court in Colorado. See D'Jamoos, 566 F.3d at 111 ("[W]e point out that by characterizing our jurisdictional finding as 'prima facie,' we do not suggest that our decision is tentative or preliminary. Rather, if the District Court determines on remand that a transfer is in the interest of justice and transfers the case to the District of Colorado, we believe that the Colorado court will be bound by our prima facie finding of personal jurisdiction insofar as that ruling will be law of the case.") (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816-17 (1988)).

example, the presence of relevant witnesses, documents, etc.).

Finally, it is difficult to say that the "common interests of all sovereigns in promoting social policies" weighs heavily either in favor of, or against, this court's exercise of personal jurisdiction over Pilatus. But, because substantial discovery has already taken place in this forum, and because one of the defendants resides in this state (along with many of its employees, some of whom are likely to be witnesses), the interests of judicial economy and efficiency counsel in favor of the exercise of personal jurisdiction over Pilatus -- again, at least as to plaintiffs' Service Manuals Claim.

B. The Defective Aircraft Claim.

Because plaintiffs must demonstrate that the court has personal jurisdiction over Pilatus as to each of their claims, it is appropriate to consider whether there is an independent basis to exercise specific personal jurisdiction over Pilatus with respect to the Defective Aircraft Claim. See generally Phillips Exeter Academy, 196 F.3d at 289 ("We commend the lower court's decision to analyze the contract and tort claims discretely. Questions of specific jurisdiction are always tied to the particular claims asserted.").

Here, for largely the same reasons expressed by the Court of Appeals for the Third Circuit, the court concludes that if plaintiffs' Defective Aircraft Claim were standing alone, the court would lack specific personal jurisdiction over Pilatus. See D'Jamoos, 566 F.3d at 103-06. In short, plaintiffs' claim that Pilatus defectively designed and manufactured (in Europe) the PC-12 aircraft at issue in this case does not "directly

arise out of, or relate to, [Pilatus's] forum-state activities." United Elec. Workers, 960 F.2d at 1089. As the Court of Appeals for the Third Circuit observed with respect to personal jurisdiction in Pennsylvania:

> The record before us conclusively establishes that Pilatus's direct contacts within Pennsylvania are quite limited . . . . Although Pilatus designed and manufactured the subject aircraft, it did so in Switzerland and then sold the plane in Europe. The aircraft later reached the United States via a series of third-party resales in which Pilatus was not involved, only arriving in Pennsylvania because it was making a stopover on an interstate flight. Pilatus did not profit from activities in Pennsylvania as a result of the aircraft's initial sale or resales. And although a small number of Pilatus's PC-12s are based in Pennsylvania, there is no record evidence indicating how those planes reached Pennsylvania. Certainly, we have no basis to believe that Pilatus sent the planes to Pennsylvania.

D'Jamoos, 566 F.3d at 103 (footnote omitted). Virtually the same facts and legal analysis apply with regard to Pilatus's contacts with New Hampshire. The only distinction is that Pilatus regularly sent the service and maintenance manuals discussed above to Atlas. Those contacts with this forum are, however, unrelated to plaintiffs' claim that Pilatus designed, manufactured, and sold a defective aircraft.

III. Pendent Personal Jurisdiction.

The doctrine of pendent personal jurisdiction (at least as it applies in diversity cases) essentially provides that "where a plaintiff has established jurisdiction over a non-resident defendant with respect to one state law cause of action, the court[] . . . will exercise jurisdiction over that defendant with respect to related state claims" that would not, on their own, support personal jurisdiction. Val Leasing, Inc. v. Hutson, 674 F. Supp. 53, 56 (D. Mass. 1987). See also Anderson v. Century Prods. Co., 943 F. Supp. 137, 145 (D.N.H. 1996) (court exercised pendent personal jurisdiction with respect to contract claim after concluding that it had personal jurisdiction over defendant as to plaintiff's tort claims); Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1181 (9th Cir. 2004) ("When a defendant must appear in a forum to defend against one claim, it is often reasonable to compel that defendant to answer other claims in the same suit arising out of a common nucleus of operative facts. We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine."); United States v. Botefuhr, 309 F.3d 1263, 1273 (10th Cir. 2002) ("[T]he majority of federal district courts and every circuit court of appeals to address the question have upheld the application of pendent personal jurisdiction, and we see no reason why, in certain situations, the assertion of pendent personal jurisdiction would be inappropriate.") (citations omitted).

Professors Wright and Miller summarized the doctrine of pendent personal jurisdiction as follows:

> [T]he pendent personal jurisdiction doctrine in both the diversity and federal question contexts is best articulated as follows: a district court has discretion to exercise personal jurisdiction over a claim that it ordinarily lacks personal jurisdiction over only when that claim arises out of the same common nucleus of operative fact as does a claim that is within the in personam jurisdiction power of the court. . . Under this description of the doctrine, a district court may not reach beyond the forum state's long-arm statute merely because doing so would promote efficiency. The court first must find that the additional claim is within the same common nucleus of operative fact as a claim that already falls within the ambit of the forum state's long-arm statute.

4A C.A. Wright & M.K. Miller, Federal Practice and Procedure § 1069.7 (2d ed. 1995).

In the exercise of its discretion, the court concludes that it is appropriate to apply that doctrine in this case. Because both of plaintiffs' claims against Pilatus arise out of the same common nucleus of operative fact, the court may properly exercise personal jurisdiction over Pilatus as to the Defective Aircraft Claim. Both claims – the Defective Aircraft Claim and the Service Manuals Claim – arise from the crash of the Pilatus aircraft in Pennsylvania. By virtue of having personal jurisdiction over Pilatus with regard to the Service Manuals Claim, the court may properly exercise personal jurisdiction over Pilatus as to any remaining related claims.

IV. Pilatus's Motion to Dismiss First-Filed Action.

As noted above, the United States District Court for the Eastern District of Pennsylvania - the court in which plaintiffs' filed virtually identical claims against Pilatus – recently transferred those claims to the United States District Court for the District of Colorado. D'Jamoos v. Pilatus Aircraft Ltd., Case no. 07-1153 (E.D. Pa. Oct. 1, 2009). See generally 28 U.S.C. § 1631. In the wake of that transfer, Pilatus has filed a motion to dismiss this action in favor of the "first-filed" action now pending in Colorado.

Plaintiffs object and, in response, say: (1) they have consistently made clear their intention to litigate their claims against Pilatus in a single forum; (2) they would prefer to litigate those claims in New Hampshire, given the fact that they are already litigating claims against Atlas here and because it is reasonably close to Rhode Island - the state in which the plaintiffs reside; and (3) "[s]hould this Court rule that it has personal jurisdiction over Pilatus, the plaintiffs will immediately dismiss their claims against Pilatus in Colorado." Plaintiff's memorandum (document no. 74) at 2.

The judicial opinions (and the legal treatise) upon which Pilatus relies in support of its motion to dismiss are not on point. In those cases, the so-called "first-filed rule" arose when, after a plaintiff had sued a defendant in a particular forum, that defendant subsequently sued the plaintiff in a different forum. The question then arose as to whether the two related cases should be consolidated and, if so, in which forum. See TPM Holdings, Inc. v. Intra-Gold Indus., 91 F.3d 1 (1st Cir.1996); Cianbro Corp v. Curran-Lavoie, Inc.,

814 F.2d 7 (1st Cir. 1987). See also James Moore, Moore's Federal Practice § 111.13[1][o] (2009) ("If two actions involving the same parties and identical issues ('mirror image' actions) are pending in different districts, whether filed in those courts originally or removed there, competing motions to dismiss or transfer to the other district frequently are made in both actions. In general, under the 'first-filed rule,' the first-filed action will be given priority and be allowed to proceed in favor of the later action, unless convenience or other special circumstances dictate departure from the rule.") (footnotes omitted) (emphasis supplied).

Here, however, both this case and the one that was recently transferred to Colorado were filed by the estates of the six victims of the crash. And, those plaintiffs have expressed a preference to litigate their claims against Pilatus in this forum (along with their claims against Atlas). They have also stated that if this court concludes that it may properly exercise personal jurisdiction over Pilatus (which it has), then they will dismiss the identical claims currently pending in Colorado.

Given the somewhat unusual facts of this case, the plaintiffs' preference for litigating their claims in this forum, and the fact that plaintiffs are already litigating claims arising out of the crash in this forum against another defendant, dismissing or transferring their claims against Pilatus to Colorado would not represent an efficient use of judicial resources. It would, however, cause the parties to unnecessarily incur substantial additional legal fees and would likely impose an unnecessary burden on at least some of the

potential witnesses in this proceeding (many of whom presumably live in New Hampshire and Rhode Island).

Accordingly, in the exercise of its discretion, the court declines Pilatus's invitation to dismiss this case (or transfer it to the United States District Court for the District of Colorado for consolidation with the pending case in that forum).

Conclusion

Plaintiffs have carried their burden of demonstrating that the court may, consistent with principles of due process and fundamental fairness, exercise personal jurisdiction over the defendant, Pilatus Aircraft, Ltd. Accordingly, Pilatus's Renewed Motion to Dismiss for Lack of Personal Jurisdiction (document no. 50) is denied. And, for the reasons discussed above, as well as those set forth in plaintiffs' memorandum (document no. 74), Pilatus's motion to dismiss in favor of first-filed action (document no. 71) is denied.

Plaintiffs' motion to strike (document no. 77), and their motion to file a seven page reply brief (document no. 82) are denied as moot.

SO ORDERED.

/s/
Steven J. McAuliffe
Chief Judge

November 9, 2009

cc: Anthony Tarricone, Esq.
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Patrick T. Jones, Esq.
Thomas R. Watson, Esq.
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Jeffrey A. Rossman, Esq.
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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO (DENVER)

No. 1:09-CV-02583-REB-BNB

[Filed November 13, 2009]

THERESA D'JAMOOS, as Executrix of the Estate of Dawn Weingeroff, et al.,	)
Plaintiffs,	)
v.	)
PILATUS AIRCRAFT, LTD.,	)
Defendants.	)

PLAINTIFFS' NOTICE OF DISMISSAL WITHOUT PREJUDICE PURSUANT TO FED.R.CIV.P 41(a)(1)(A)(i)

All of the plaintiffs hereby dismiss this action against Pilatus Aircraft Ltd. without prejudice.

By their attorneys,

/s/

Joseph P. Musacchio
(*Pending Admission Pro Hac Vice*)
KREINDLER & KREINDLER, LLP
277 Dartmouth Street
Boston, MA 02116
(617) 424-9100

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on all counsel of record via first class mail on November 12, 2009.

/s/

Joseph P. Musacchio

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 09-cv-02583-REB-BNB

[Filed November 16, 2009]

THERESA D'JAMOOS, as Executrix of the Estate of Dawn Elizabeth Weingeroff, FREDERICK L. WEINGEROFF, Administrator of the Estate of Leland Weingeroff, FREDERICK L. WEINGEROFF, Executor of the Estate of Gregg C. Weingeroff, STANLEY J. WACHTENHIEM, Executor of the Estate of Jeffrey M. Jacober, MICHAEL A. JACOBER, Co-Executor of the Estate of Karen L. Jacober, DAVID S. JACOBER, Co-Executor of the Estate of Karen L. Jacober, MICHAEL A. JACOBER, Co-Executor of the Estate of Eric B. Jacober, and DAVID S. JACOBER, Co-Administrator of the Estate of Eric B. Jacober,	)
Plaintiffs,	)
v.	)

PILATUS AIRCRAFT LTD,)
)
Defendant.)
_____)

ORDER OF DISMISSAL WITHOUT PREJUDICE

Blackburn, J.

The matter before me is the **Plaintiffs' Notice of Dismissal Without Prejudice Pursuant to Fed.R.Civ.P. 41(a)(1)(A)(I)** [#16] filed November 13, 2009. After careful review of the notice and the file, I conclude that the notice should be approved and that this action should be dismissed without prejudice.

THEREFORE, IT IS ORDERED as follows:

1. That the **Plaintiffs' Notice of Dismissal Without Prejudice Pursuant to Fed.R.Civ.P. 41(a)(1)(A)(I)** [#16], filed November 13, 2009, is **APPROVED**; and

2. That this action is **DISMISSED WITHOUT PREJUDICE** with the parties to pay their own attorney fees and costs.

Dated November 16, 2009.

BY THE COURT:

/s/
Robert E. Blackburn
United States District Judge

Supreme Court, U.S.
FILED
MAR 16 2010
OFFICE OF THE CLERK

NO. 09-489

IN THE

Supreme Court of the United States

THERESA D'JAMOOS, *ET AL.*,

Petitioners,

v.

PILATUS AIRCRAFT, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

INTRODUCTION 1

ARGUMENT 2

I. THIS COURT HAS JURISDICTION OVER PETITIONERS' CLAIMS AGAINST PILATUS 2

II. THE PLANE THAT CRASHED IN PENNSYLVANIA WAS PART OF THE STREAM OF COMMERCE THAT PILATUS DIRECTED AT THE UNITED STATES 5

III. THE CONFLICT IN LOWER COURTS DESCRIBED IN THE PETITION RECENTLY HAS DEEPENED 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967) 4

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 2

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 5

Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) 2

In re Grand Jury Proceedings Under Seal, 947 F.2d 1188 (4th Cir. 1991) 2

Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994) 4

Mason v. Ohio River Co., 373 F.2d 69 (6th Cir. 1967) 3, 4

Nicastro v. McIntyre Machinery America, Ltd., 987 A.2d 575 (N.J. 2010) 1, 7, 8, 9

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 4

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 3

Statutes

49 U.S.C. § 44704(a) 6

49 U.S.C. § 44704(b) 6

49 U.S.C. § 44704(c) 6

Rules

Fed. R. App. P. 42 3

Fed. R. Civ. P. 41(a)(1) 3

Fed. R. Civ. P. 60(b)(6) 4

Sup. Ct. R. 46 ..... 1, 3

Regulations

14 C.F.R. § 21.183 6

14 C.F.R. § 21.21 6

14 C.F.R. §§ 21.139, 21.143 6

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondent's Brief in Opposition does not deny that there is a conflict in the lower courts regarding the question presented. That conflict has become more striking with the recent decision of the Supreme Court of New Jersey in *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575 (N.J. 2010), which conflicts with the decision below.

Pilatus instead asserts that this case is moot because Petitioners voluntarily dismissed in Colorado their claim that the Colorado court had jurisdiction to hear the same substantive claims asserted here to be justiciable in Pennsylvania. Petitioners did not, pursuant to Supreme Court Rule 46, dismiss their claim, pending in this court, that the Pennsylvania court had jurisdiction to hear claims pending against Pilatus. That question was and is pending in this court and in no other court. It was never within the jurisdiction of the Colorado court, and no action taken there affected the claims pending in this Court.

Pilatus also asserts that the plane at issue here, a PC-12 sold initially in France before being re-sold into the United States, was not part of the stream of commerce Pilatus aims at the United States. Pilatus purposely designs and manufactures the PC-12 plane to meet Federal Aviation Administration standards so that the plane can be sold and operated in United States. It sells two thirds of those planes in the United States, earning half of its worldwide profits from those sales. At the initial sale of any of these planes Pilatus profits from their ability to be sold

and operated in the United States. Pilatus was purposefully exploiting the United States market, and whether it may be held responsible for six deaths caused here by a defective plane is legitimately a question presented by this case.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PETITIONERS' CLAIMS AGAINST PILATUS

In this case the Third Circuit decided two issues: it affirmed a finding of the Pennsylvania district court that it could not exercise personal jurisdiction over Pilatus; and it reversed and remanded a finding that Petitioners' had not made a *prima facie* showing that a district court in Colorado might exercise personal jurisdiction over Pilatus. Pet. App. 31a, 61a-62a.

Petitioners timely sought review in this court of the first issue. That action divested lower courts of "control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).[1] In *Griggs* this Court was discussing the relationship between district courts and courts of appeals, but the principle at play—that a higher and a lower court ought not simultaneously

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[1] *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990), for examples of the kinds of collateral matters over which lower courts may continue to exercise jurisdiction pending appeal. *See also In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1190 (4th Cir. 1991) (district court retains jurisdiction over matters "in aid of the appeal.").

deal with the same substance—is equally applicable to the relationship between this court and lower courts. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 114 n.10 (1996) (Souter, J. dissenting on other grounds) (applying doctrine to jurisdiction of this Court).

The pendency of the first issue decided by the Third Circuit here divested any lower court of jurisdiction over that issue. It was not pending in either the Pennsylvania district court on remand or the Colorado court upon transfer, and it was not available in Colorado for dismissal under Fed. R. Civ. P. 41(a)(1). It could be dismissed only in this court, pursuant to Supreme Court Rule 46. Rule 46 echoes the Federal Rules of Appellate Procedure, which similarly acknowledge that the lower courts are not seized with jurisdiction to dismiss cases that have been appealed from them and are pending in higher courts. *See* Fed. R. App. P. 42.

It is well-recognized that a plaintiff can assert that multiple venues have jurisdiction over the same claims against the same party. *See, e.g., Mason v. Ohio River Co.*, 373 F.2d 69 (6th Cir. 1967). In *Mason*, plaintiffs had filed suits in Pennsylvania state court that were dismissed on inconvenient forum grounds. Plaintiffs appealed, and "in order to safeguard their rights, in case the Supreme Court of Pennsylvania affirmed the orders of dismissal, they filed the same suits in the United States District Court for the Western District of Pennsylvania." *Id.* at 70. In the interests of convenience and justice, those suits were transferred to a district court in Ohio. *Id.* The Supreme Court of Pennsylvania then reversed the lower state court and found jurisdiction in Pennsylvania. The Sixth Circuit, holding that, as

here, no prejudice accrued to the defendant from the dismissal in federal court, noted that "the plaintiff had a right to maintain a cause of action in any court having jurisdiction thereof." *Id.* at 72.

Pilatus also asserts that the issue before the court has not been finally decided and could be mooted by, for example, Petitioners "prevailing on the merits of their claim in Colorado." Br. in Opp. 8 n.2. That would not moot the claim that Plaintiff was entitled to maintain the same action in Pennsylvania, but it would likely prevent Petitioners from ever having that issue finally resolved by this Court, thereby depriving plaintiffs of their choice of forum, a choice that "should rarely be disturbed." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

Pilatus cites *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967), as counseling denial of certiorari because the ruling of the Third Circuit is interlocutory. But *Brotherhood of Locomotive Firemen* dealt with remand of an issue—whether there was contempt—that readily could be reviewed on subsequent vertical appeal. Absent revival of a claim in Colorado in which the claim of jurisdiction in Pennsylvania were preserved,[2] other vertical review is not possible here.

This Court's inquiry into finality is practical, informed by concern of avoiding injustice, and

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[2] If the issue of jurisdiction in Pennsylvania were ever before the Colorado court, such a revival perhaps would be possible under Fed. R. Civ. P. 60(b)(6). *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

advancing resolution of a case. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964) (noting that resolution is particularly appropriate where a matter is "'fundamental to the further conduct of the case.'"). Because no forum has jurisdiction over all parties, this litigation is necessarily piecemeal, and by dismissing the Colorado action Petitioners simply attempted what consolidation was possible.[3] Alternative vertical review of the issue pending in this court is impossible, and would be extraordinarily unlikely even if Respondent were correct that these claims were pending in Colorado at the time of dismissal. Practicality and justice suggest that the decision of the Third Circuit is final and reviewable under *Gillespie*.

II. THE PLANE THAT CRASHED IN PENNSYLVANIA WAS PART OF THE STREAM OF COMMERCE THAT PILATUS DIRECTED AT THE UNITED STATES

Pilatus asserts that the question presented does not arise in this case because the plane that crashed in Pennsylvania, having first been sold in France before having been re-sold into the United States, was not part of the stream of commerce Pilatus directed at the United States. Br. in Opp. 9-10. By designing and manufacturing its plane to FAA specifications,[4] selling two-thirds of its planes in the

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[3] *See* Petitioner's letter to court of November 20, 2009; Br. in Opp. 6-7.

[4] Beginning in the early 1990s, Pilatus designed the PC-12 aircraft to meet FAA certification requirements, a

United States, and generating half its worldwide profits from those sales, Pilatus purposefully and successfully availed itself of the United States market. That a plane originally sold elsewhere is flown in any state of the United States is design, not happenstance. That it might crash and cause harm here is foreseeable to the Respondent, regardless of where the plane originally was sold.

At the point of sale of each plane, regardless of where sold, Pilatus profited from the capacity of each plane to be registered and operated in the United States. The Third Circuit gave credence to this fact, Pet. App. 44a n.14, but rejected it as satisfying its requirement that Pilatus "'injected its goods, albeit indirectly, into the forum State,'" Pennsylvania. Pet.

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prerequisite to sale or operation of the plane here. *See* 49 U.S.C. § 44704(a); 14 C.F.R. § 21.21; (3rd Cir. R. App. Vol. II 70-78). Under the certification process, a manufacturer must receive a "type certificate" indicating the FAA's approval of an aircraft's basic design and ensuring that the design complies with applicable FAA minimum design and safety regulations. 49 U.S.C. § 44704(a); 14 C.F.R. § 21.21. A manufacturer then must obtain a "production certificate," which signifies FAA approval of the manufacturing process proposed to construct the approved design. 49 U.S.C. § 44704(b); 14 C.F.R. §§ 21.139, 21.143. Before an aircraft is put into service in the United States, the owner must obtain an "airworthiness certificate" proving that the aircraft conforms to the type certificate. 49 U.S.C. § 44704(c); 14 C.F.R. § 21.183. The FAA certification process culminated in 1994 with the issuance of a type certificate for the Pilatus PC-12. That certificate permitted use of the aircraft in all fifty States and pre-empted state preclusion of the aircraft from state airspace.

App. 9a. There is no question that Pilatus aimed its stream of commerce at the United States as a whole, even if it did not aim it at Pennsylvania in particular, or that that it benefited from the capacity of this plane to be sold *and operated* in the United States, or that it injected this particular plane into the United States, "albeit indirectly." The question presented asks about the legal consequences of exactly that fact pattern. The place of first sale of this plane is not material to answering that question.

III. THE CONFLICT IN LOWER COURTS DESCRIBED IN THE PETITION RECENTLY HAS DEEPENED

Respondent does not deny that an important doctrinal conflict exists in the lower courts. That conflict deepened with the New Jersey Supreme Court's decision on February 2, 2010, in *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575 (N.J. 2010), with one dissenting justice calling for review by this Court. On facts analogous to those here—a marketing scheme designed to reach all fifty states, with harm caused in the forum—the Supreme Court of New Jersey found that statutory and constitutional standards of personal jurisdiction were satisfied. Because of the conflict between *Nicastro* and the decision of the Third Circuit in this case, in New Jersey, choice of state or federal forum is now determinative on the question of personal jurisdiction. If a plaintiff files suit in New Jersey state court, one rule for personal jurisdiction applies, yet if the same plaintiff files the same action in the federal district court, a different rule applies. This is an undesirable situation.

The New Jersey court highlighted the importance of the issue before it:

> Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation's shores and into our State. The question before us is whether the jurisdictional law of this State will reflect this new reality.

Id. at 576. After finding that the New Jersey long-arm statute reached the conduct in question, the court described the constitutional issue this way:

> The preeminent issue is whether we will read the Due Process Clause in a way that renders a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer, through an independent distributor, knowing that the final destination might be a New Jersey consumer.

Id. at 590. Two justices dissented, with one calling for review by this Court:

> Because the majority "has decided an important federal question in a way that conflicts with" settled federal constitutional principles, Sup. Ct. R. 10(b), creates a new, insubstantial, and

> meaningless standard for the unbounded exercise of long-arm jurisdiction, and disturbs the careful balance that limits the exercise of judicial power between and among the several states, this decision is ripe for review and correction by the Supreme Court of the United States.

Id. at 605 (Rivera-Soto, J., dissenting).

CONCLUSION

The question presented asks whether the jurisdictional law of the United States is adapted to the realities of the contemporary world. That question is presented by this case, and affects a large volume of cases. This Court should grant the Petition and answer the question.

March 16, 2010 Respectfully submitted,

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